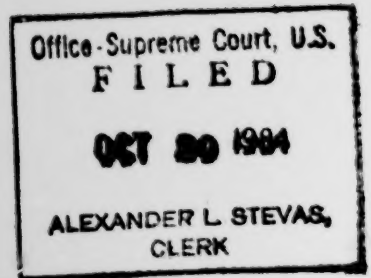


84-643



NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF ARKANSAS

PETITIONER

V.

RANDY LEWIS BAIRD
HENRY EDWARD HEIMEYER
and TERRY L. FORGY

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTICRARI
TO THE ARKANSAS COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE SEIZURE AT AN ADULT BOOKSTORE PURSUANT TO AN ARREST FOR THE SALE AND DISTRIBUTION OF OBSCENE MATERIALS OF A SINGLE COPY OF FORTY-SEVEN MAGAZINES DEPICTING "HARD-CORE SEXUAL CONDUCT ON THEIR COVERS IN PLAIN VIEW WAS "PRIOR RESTRAINT OF THE RIGHT OF EXPRESSION" IN VIOLATION OF RESPONDENTS' FIRST AND FOURTH AMENDMENT RIGHTS AS ENUNCIATED IN ROADEN V. KENTUCKY, 413 U.S. 96 (1973)?

II.

WHETHER THE ADMISSION INTO EVIDENCE OF AN INVENTORY LIST OF THE TITLES OF FORTY-SEVEN MAGAZINES WAS CONSTITUTIONAL AS DERIVING FROM AN "INDEPENDENT SOURCE?"

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OPINIONS BELOW

The opinion of the Arkansas Court of Appeals in this case appears at 12 Ark. App. 71, 671 S.W.2d 191 (1984). A copy of this opinion appears in the appendix. A petition for rehearing was denied on August 22, 1984 and notice of this denial also appears in the appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3). Petitioner seeks review of an opinion of the Arkansas Court of Appeals in which was found a violation of respondents' First and Fourth Amendment rights under the United States Constitution pursuant to Roaden v. Kentucky, 413 U.S. 497 (1973). The opinion was rendered on June 20, 1984 with a petition for rehearing being denied

on August 22, 1984

Pursuant to Rule 17 of the Rules of the Supreme Court, petition submits that the opinion to be reviewed is in conflict with this Court's holdings in Roaden v. Kentucky, supra, and its underlying "prior restraint" cases. Petitioner submits further that the opinion is in conflict with this Court's holdings on the "independent source" rule applicable to evidence allegedly admitted in violation of the Fourth Amendment. See Segura v. United States, __ U.S. __, 104 S.Ct. 3380, 82 L.Ed.2d 99 (July 5, 1984)

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution, Amendment One

Congress shall make no law . . .
abridging the freedom of speech, or
of the press, . . .

Amendment Four

The right of the people to be secure
in their persons, houses, papers, and
effects, against unreasonable searches



(c) Taken as a whole, lacks serious literary, artistic, political or scientific value.

STATEMENT OF THE CASE

Respondents were arrested on February 28, 1983 and charged with the sale and distribution of obscene literature, a misdemeanor under Ark. Stat. Ann. §41-3553 (Repl. 1977). Respondents appealed a municipal court conviction to the Miller County Circuit Court where they were tried by a jury and again convicted on June 8, 1983. Baird was fined \$250.00; Heimeyer was fined \$250.00 and sentenced to to thirty days in the Miller County Jail; and Forgy was fined \$500.00 and sentenced to sixty days in the county jail.

Prior to trial in the circuit court, respondents filed a motion to suppress evidence (forty-seven magazines) seized from the State Line Book Store. A hearing

was held on the motion June 3, 1983. This motion was denied, but the seized evidence was not introduced at trial. A list of the titles of the seized items was introduced. Two magazines purchased by a police officer prior to the seizure were also introduced, without objection.

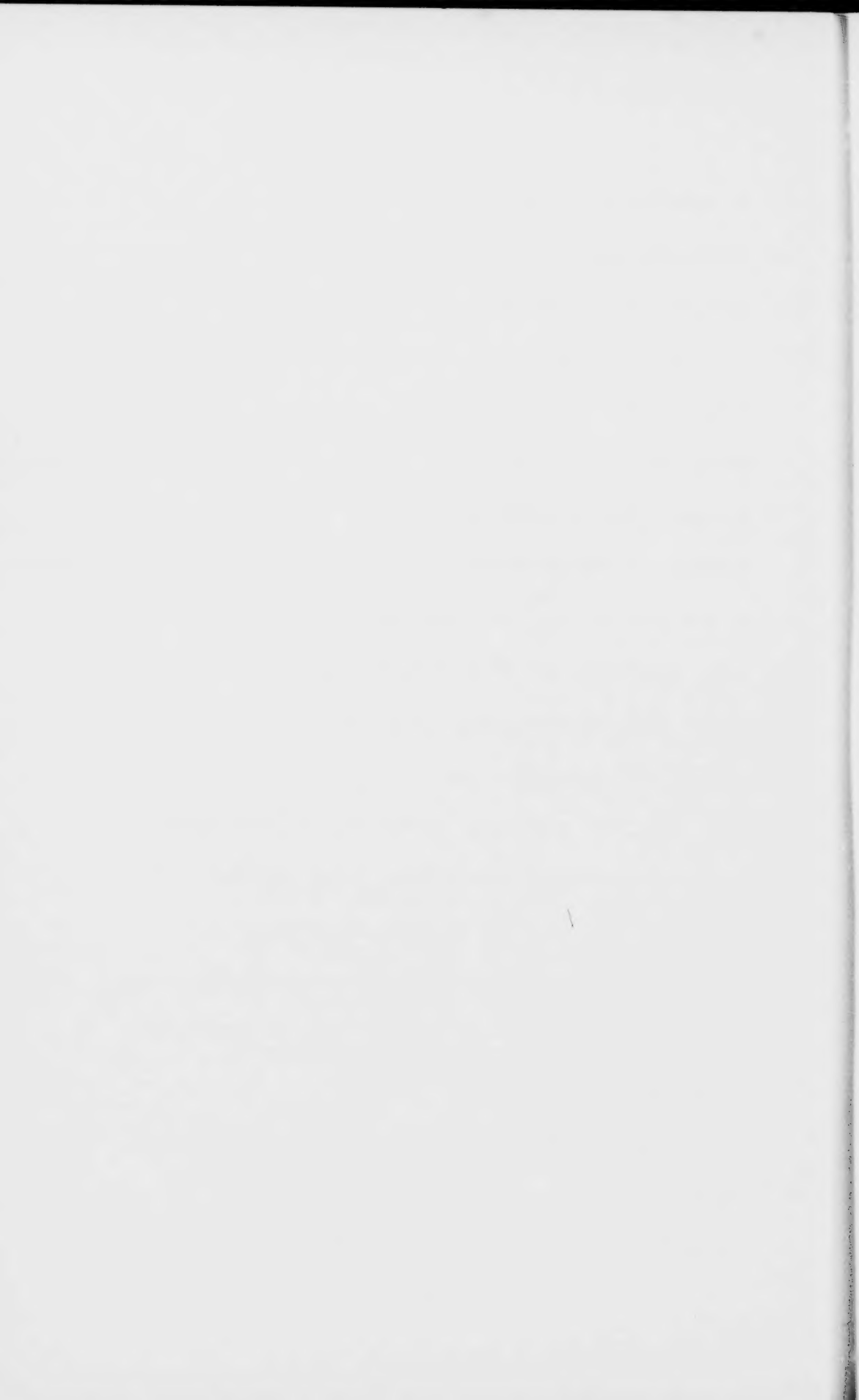
Respondent's specifically relied on Roaden v. Kentucky, 413 U.S. 96 (1973) in their brief in support of their motion to suppress in the trial court. (See Appendix C.) The State argued that neither a mass seizure, nor prior restraint had occurred and that the seizure was reasonable. (See Appendix D.) The trial court rejected each contention in the respondents' motion. (See Appendix E.)

On the appeal, respondents again relied on Roaden and the State argued that Roaden allowed the finding of

a reasonable seizure under the circumstances of this case. The Arkansas Court of Appeals found a violation of the First and Fourth Amendments under Roaden and reversed and remanded the case as to Baird and Heimeyer. As to Forgy, the court found any error harmless beyond a reasonable doubt and affirmed. A petition for review was denied, but the mandate of the Arkansas Court has been stayed pending review of this petition in this Court.

Chief Justice Mayfield dissented on the grounds that the list of titles did not result from the seizure, but rather from the officers' independent observation of the titles in plain view. (See Appendix A)

Petitioner seeks review of this opinion by this Court as it is in conflict with previous opinions of this



Court. Specifically, respondent submits that Roaden was incorrectly applied under the circumstances of this case and that the list of titles should not be suppressed as "fruit" of that search.



REASONS FOR GRANTING
THE WRIT

I.

THE SEIZURE OF FORTY-SEVEN
MAGAZINES DEPICTING "HARD-CORE
SEXUAL CONDUCT" ON THEIR COVERS
WAS NEITHER "PRIOR RESTRAINT"
OF RESPONDENTS' FIRST AMENDMENT
RIGHTS UNDER ROADEN V. KENTUCKY,
413 U.S. 96 (1983), NOR AN
UNREASONABLE SEIZURE UNDER THE
FOURTH AMENDMENT.

The United States Supreme Court
stated in Roaden v. Kentucky, 413 U.S.
96 (1973) that "A seizure reasonable as
to one type of material in one setting
may be unreasonable in a different
setting or with respect to another
kind of material." 413 U.S. at 501.
The applicability of Roaden to the
circumstances of this case was speci-
fically argued by both sides before
the trial court and before the Arkansas
Court of Appeals. At a suppression
hearing, the Miller County Circuit
Court found the seizure reasonable.



As to the limit on the type of material seized and the setting within which it was seized. The Arkansas Court of Appeals found these same facts to represent an unreasonable seizure under Roaden. The State submits that the seizure was neither "prior restraint" of respondents' First Amendment rights, nor an unreasonable seizure under the Fourth Amendment and respectfully requests review of the opinion of the Arkansas Court of Appeals. The United States Supreme Court stated in Roaden:

The common threat of Marcus, A Quantity of Books, and Lee Art Theatre is to be found in the nature of the materials seized and the setting in which they were taken. [Cite omitted.]

In each case the material seized fell arguably within the First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents



essentially the same restraint on expression as the seizure of all all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression whether by books or films, calls for higher hurdle in the evaluation of reasonableness. (Emphasis added.)

413 U.S. at 503-504.

In the instant case, there was not an abrupt halt to the redistribution or exhibition of the seized magazines. The State recognizes the arguable protection offered by the First Amendment to printed material, but submits that the "higher hurdle" of review in "prior restraint" cases is not applicable where only one copy of forty-seven magazines was seized pursuant to an arrest for the sale and distribution of obscene material.



The Fourth Amendment only prohibits unreasonable seizures and the purpose of the exclusionary rule is to deter illegal police activity. Mapp v. Ohio, 367 U.S. 643 (1961). Although they did not obtain a search warrant in this case, the police officers did act in good faith and diligently endeavored to proceed in accordance with the law. They sought legal advice from a judge who referred them to the prosecuting attorney. The prosecutor and a deputy advised them as to the applicable definition of "hard-core sexual conduct." Ark. Stat. Ann. §41-3585.1 (Repl. 1977) They first made a "buy" of two magazines showing explicit sex acts on the covers which they reasonably believed to come under this definition. The officers followed fairly objective standards

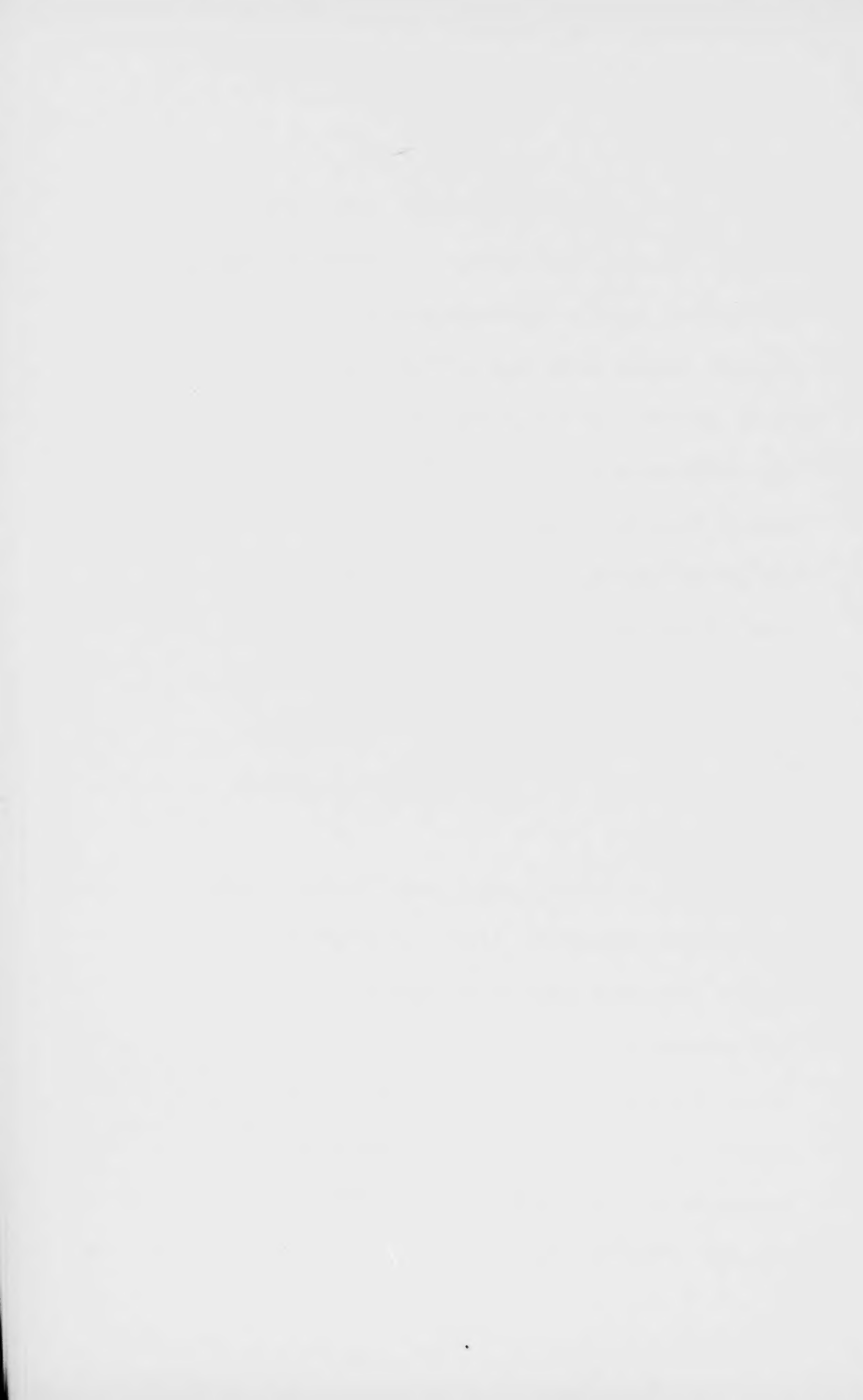
of looking for actual penetration of genitals, oral or anal openings. On the basis of the buy, they then obtained an arrest warrant for the owner of the store.

They proceeded to the book store which was the only known address of the owner. Upon arrival, they saw in plain view numerous other magazines depicting explicit sex acts comparable to the magazines purchased previously. They seized only one copy of each magazine on the display rack which depicted hardcore sexual conduct on the cover. No sex toys or films were seized. The store was not closed down.

It must also be noted that exigent circumstances were in evidence by the very name of the store -- State Line Books. The destruction of evidence was possible by simply walking across the street with it; a clear possibility

following the discovery of an outstanding arrest warrant for the owner. Baird and Heimcyer were arrested following their admissions that they worked there and the officers' observation of the obscene material. Neither the admissibility of the purchased magazines nor the arrests of appellants was challenged below. (The seized magazines were not introduced into evidence at the trial. See Point II. The obscene nature of the purchased magazines was not raised as an issue on appeal.)

Acting upon legal advice and with an arrest warrant, the officers lawfully entered the book store. Due to its state line location and the plain view observation of other obscene material, the officers conducted a seizure of limited scope. There was no willful misconduct, no attempt



to shut down the establishment.

Little privacy is expected in a commercial establishment and no deterrent value would arise from the exclusion of this evidence.

Under the totality of the circumstances of this case, the State submits that the limited seizure of the magazines was reasonable under the guidelines enunciated in Roaden v. Kentucky, supra.



II.

THE ADMISSION INTO EVIDENCE OF AN INVENTORY LIST OF THE TITLES OF FORTY-SEVEN MAGAZINES WAS CONSTITUTIONAL AS DERIVING FROM AN "INDEPENDENT SOURCE".

A list of the titles of the forty-seven magazines was introduced into evidence as State's Exhibit No. 5, but the magazines themselves were not offered into evidence. Chief Justice Mayfield rejected in his dissenting opinion the holding that the "list was a part of the unlawful seizure". He stated further:

All the police did to obtain the list was to write the titles of the magazines on a piece of paper. They didn't have to even touch the magazines to do that. They were rightly in the store and they could stand in front of the rack, read the magnificently descriptive titles, and simply write them down.

The United States Supreme Court in Nix v. Williams, __ U.S. __ (June 11, 1984) quoted from Wong Sun v.

United States, 371 U.S. 471 (1963) as follows:

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."
[371 U.S. at 487-488]

In Nix, the "inevitable discovery" rule was enunciated which limits the application of the exclusionary rule where the evidence would have inevitably been discovered by constitutional means. Nix also recognized the "independent source" rule which was further developed in Segura v. United States, ___ U.S. ___ (July 5, 1984). This rule limits the exclusionary rule where the connection between the illegal police conduct and the discovery and seizure of the evi-

dence is so "attenuated as to dissipate the taint."

Clearly the titles of these magazines were not discovered by any illegal means. The police were lawfully present in the book store and could see the titles in plain view. Even the majority opinion recognizes that the police could have made a list of these titles in order to obtain a warrant. The fact that the officers seized the magazines does not affect the independent basis of their knowledge of the titles. For whatever purpose the list was made, it only contains information which was obtained by lawful means. The names do not become "sacred and inaccessible" because the officers also seized the magazines themselves. See Silverhorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)



The officers were acting on legal advise and in good faith. Applying the exclusionary rule to the circumstances of of this case would have little deterrent value. The State submits that the admission into evidence of the list of titles was constitutional as the facts contained therein derived from an independent source.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on a writ of certiorari will only be granted when there are special and important reasons therefore. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way in conflict with applicable decisions of this Court. Petitioner submits that the Arkansas Court of Appeal's opinion is in direct conflict with Roaden v. Kentucky, supra, and Segura v. United States, supra.

Petitioner recognizes that review on a writ of certiorari is discretionary and submits that this case is worthy of consideration based on this Court's recent opinions in Fourth Amendment cases.

Therefore, for these reasons and

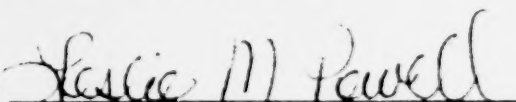


the authorities cited in this petition
for a writ of certiorari, petitioner
respectfully prays that this Court will
vacate the opinion of the Arkansas Court
of Appeals and remand the case for
further consideration under the direction
of this Court as to the applicability of
Roaden and Segura.

Respectfully submitted,

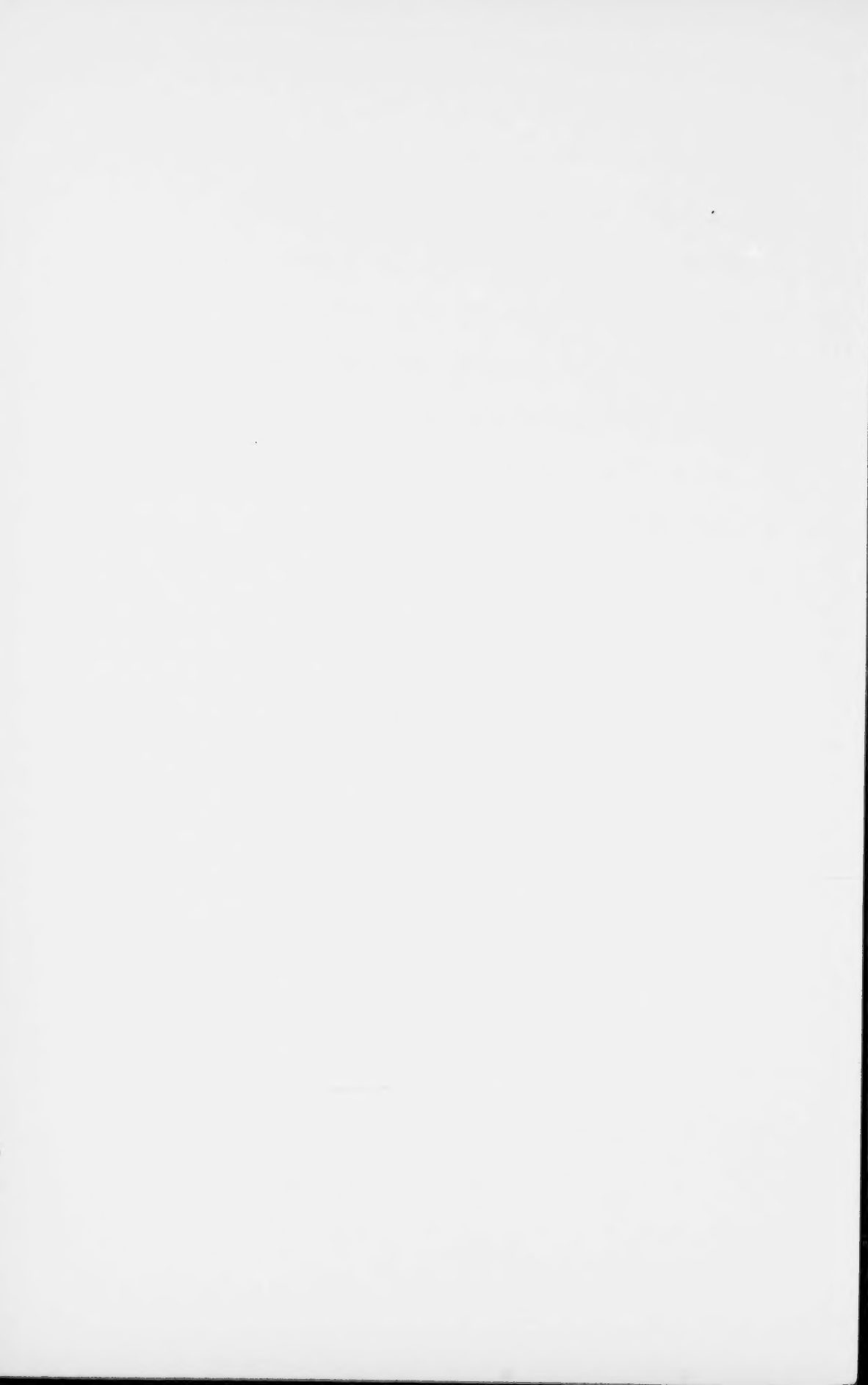
JOHN STEVEN CLARK
Attorney General

By:



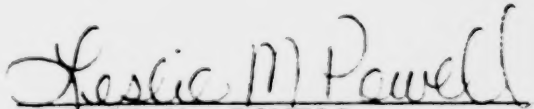
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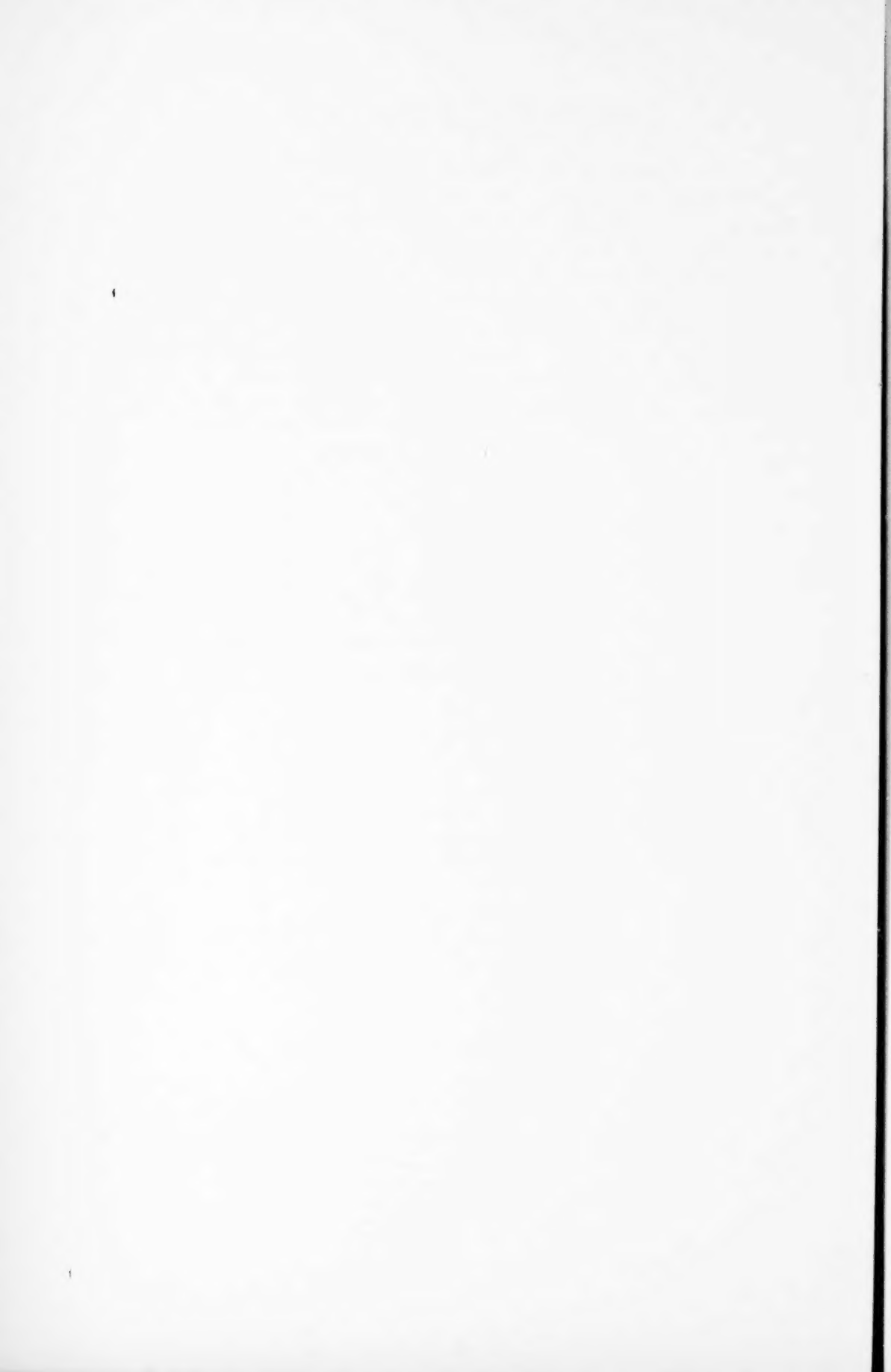


CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit has been served on respondents herein by mailing a copy of same, postage paid, to Clyde E. Lee, 217 Walnut Street, Texarkana, Arkansas 75502 and Lewis F. Mathis, 505 W. 5th Street, Suite C, P.O. Box 2783, Texarkana, Texas 75504-2783, this 19th day of October, 1984.

A handwritten signature in cursive script that reads "Leslie M. Powell". The signature is written in dark ink and is positioned above the printed name.

LESLIE M. POWELL
Assistant Attorney
General



EN BANC
ARKANSAS COURT OF APPEALS

12 ARK. APP. 71(84)

NO. CACR 83-187

Opinion Delivered
June 20, 1984

RANDY LEWIS BAIRD,
HENRY EDWARD HEIMEYER
and TERRY L. FORGY
APPELLANTS

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM MILLER
COUNTY CIRCUIT COURT

HONORABLE PHILIP
PURIFOY, CIRCUIT
JUDGE

AFFIRMED IN PART AND
REVERSED AND REMAN-
DED IN PART

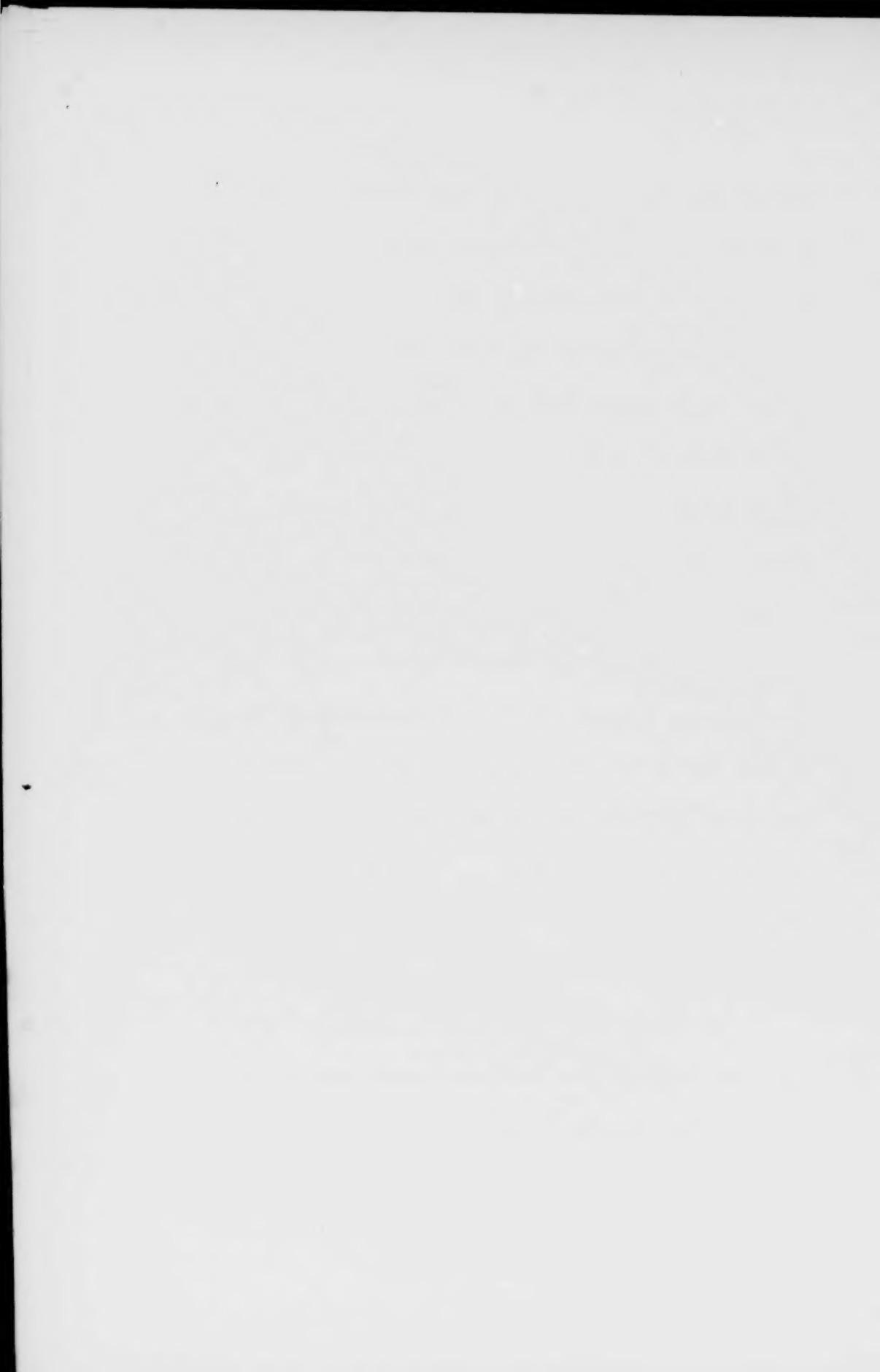
TOM GLAZE, Judge

Appellants Terry Forgy, Randy Baird
and Henry Heimeyer were charged with viola-
tion of Ark. Stat. Ann. §41-3553 (Repl.
1977), which prohibits the sale and cir-
culation of obscene periodicals. Appellant



Forgy is the owner of the State Line Book Store in Texarkana, and the other appellants are employees there. They were convicted in Texarkana Municipal Court and appealed to the Circuit Court of Miller County. After a trial de novo before a jury, they were again convicted. Baird was fined \$250; Heimeyer was fined \$250 and sentenced to thirty days in the county jail; and Forgy was fined \$500 and sentenced to sixty days in the county jail. After careful deliberation of the points raised by appellants on appeal, we affirm the conviction of Forgy and reverse the convictions of Baird and Heimeyer.

On February 28, 1983, Major Cowart of the Texarkana Police Department entered the State Line Book Store and told Forgy, who was alone, that he was there to check on some permits for the store

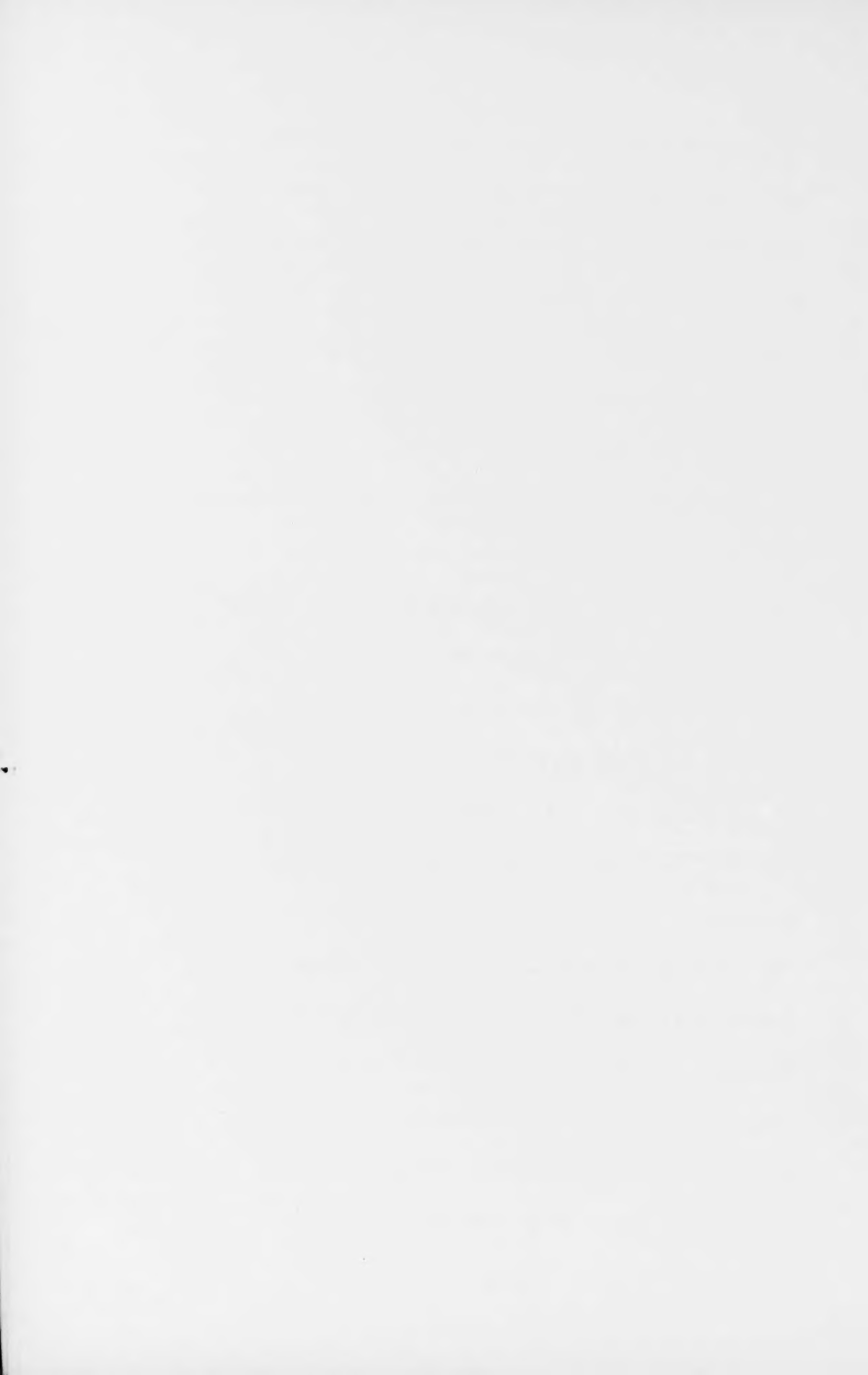


and to see if a city occupational tax had been paid. Major Cowart left the store, returned to police headquarters and ordered Officer Adcock to go to the store and buy two "obscene" magazines. Officer Adcock purchased two magazines from Forgry. After the purchases, the officers sought advice from the prosecuting attorney's office concerning whether they needed a search warrant before returning to the store. Based on that advice, the police believed that they had probable cause to arrest Forgry and returned to the book store to make the arrest and seize other obscene material. At approximately 4:00 P.M., February 28, five police officers -- armed with an arrest warrant for Forgry -- went to the book store to arrest him, but they found Baird in the store alone. Baird testified that the



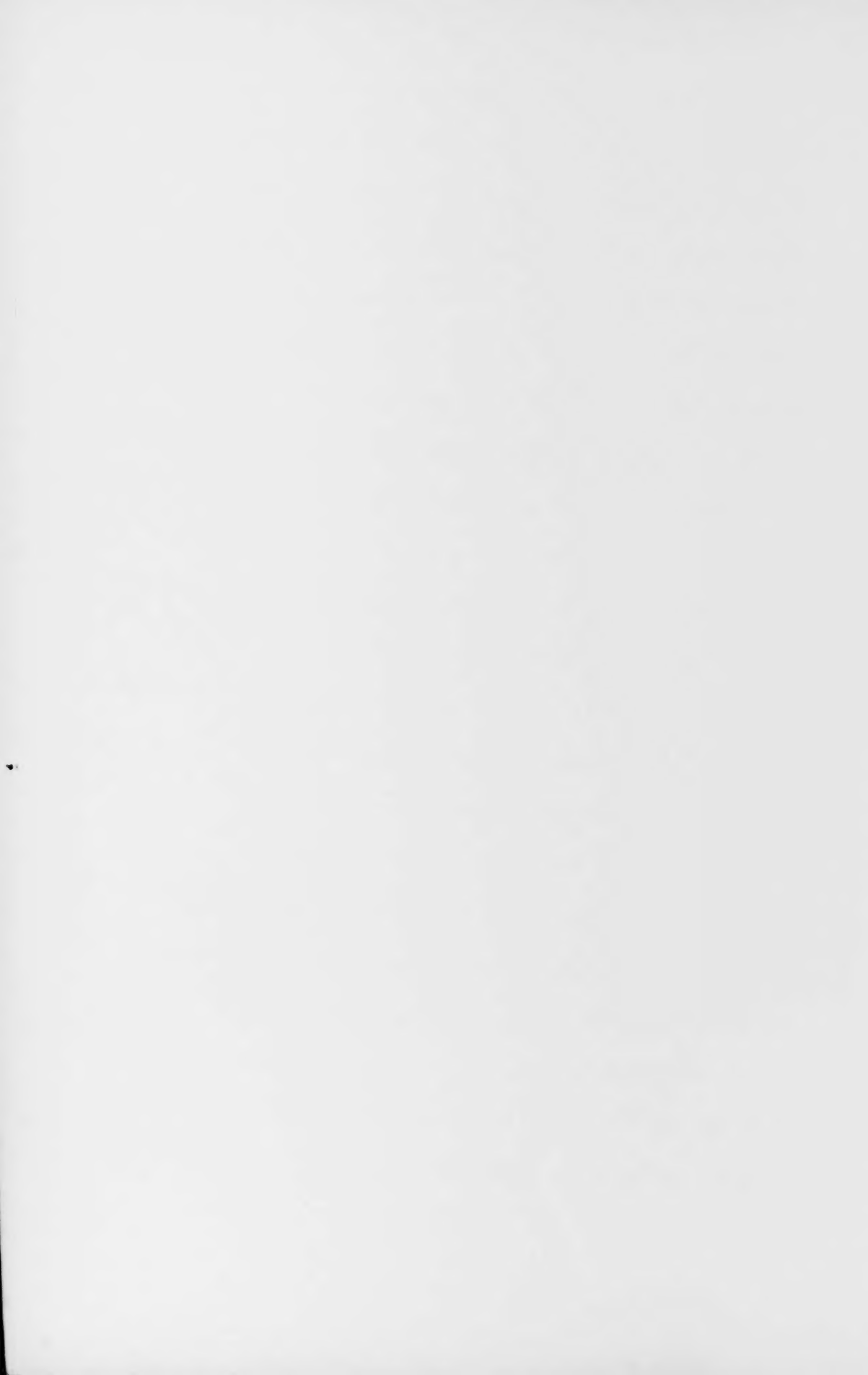
officers first began taking magazines off the rack and then asked if Forgy was there. He confirmed the officers did not have a search warrant to search the premises. After seizing forty-seven different magazines and simultaneously making a list of their titles, the officers arrested Baird and Heimeyer, who had entered the store sometime after the seizure of the magazines had begun. The officers determined the magazines were obscene by looking only at the covers of the magazines.

At trial, in addition to testimonies of the officers describing the magazine covers they saw in the book store, the State introduced the two magazines purchased as proof of the appellants' violation of the statute. The State chose not to offer into evidence the forty-seven magazines seized by the officers when they returned to arrest

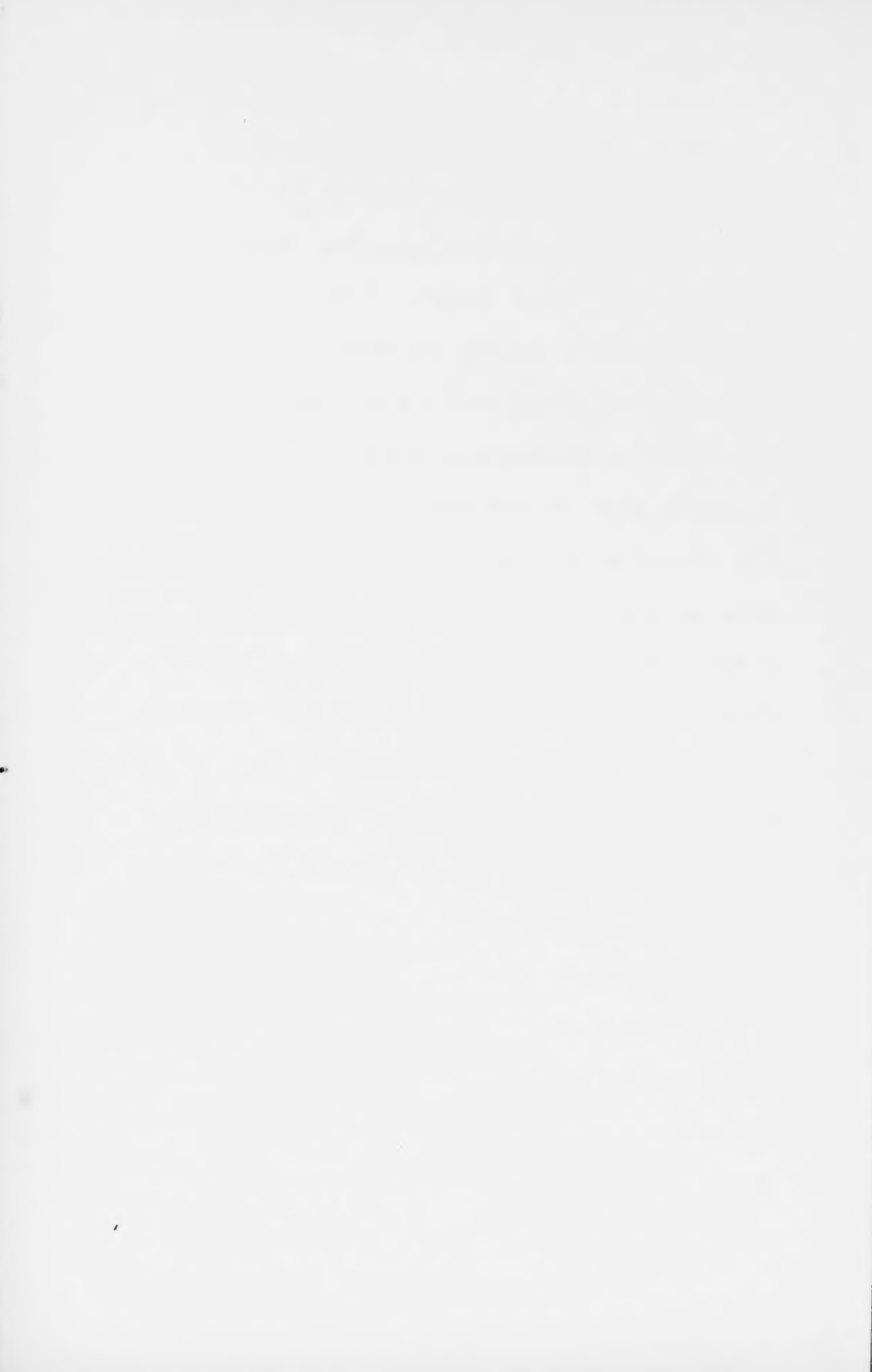


Forgy, but it did introduce a list of the titles of the forty-seven magazines. Vulgar titles typical of those on the list were: "The Fucking Sucking Sisters," "Pussies For Sale," "Lez Pussy Lickers," "Ass Slappin'," and the like. The trial court admitted the two magazines and the list of titles into evidence; however, it refused to admit an "adult film" offered by the defense in their efforts to show Texarkana's relaxed community standard regarding obscene material.

Appellants raise eight points for reversal. However, only four of the arguments are based on objections made at trial, and according to Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980), only those arguments can be heard by this Court. Two of the remaining four arguments can be easily resolved, and we will do so before addressing the other, more complicated, issues.



Appellants Baird and Heimeyer contend that because Forgy had actually sold some magazines and they had not, the trial court erred in not granting their motion to sever. This argument is, in effect, a claim that the State's evidence against Forgy is stronger than the evidence against them. The relative strength of the State's case against each co-defendant is a proper factor for a court to consider when ruling on a motion to sever; however, ever, it is only one of several factors for for the court to consider. See McDaniel v. State, 278 Ark. 631, 648 S.W.2d 57 (1983). Significantly, the evidence offered against the appellants was essentially the same, differing mainly in that Forgy sold two obscene magazines, but the other appellants kept or exposed obscene magazines. Given the totality of circumstances present in this case,



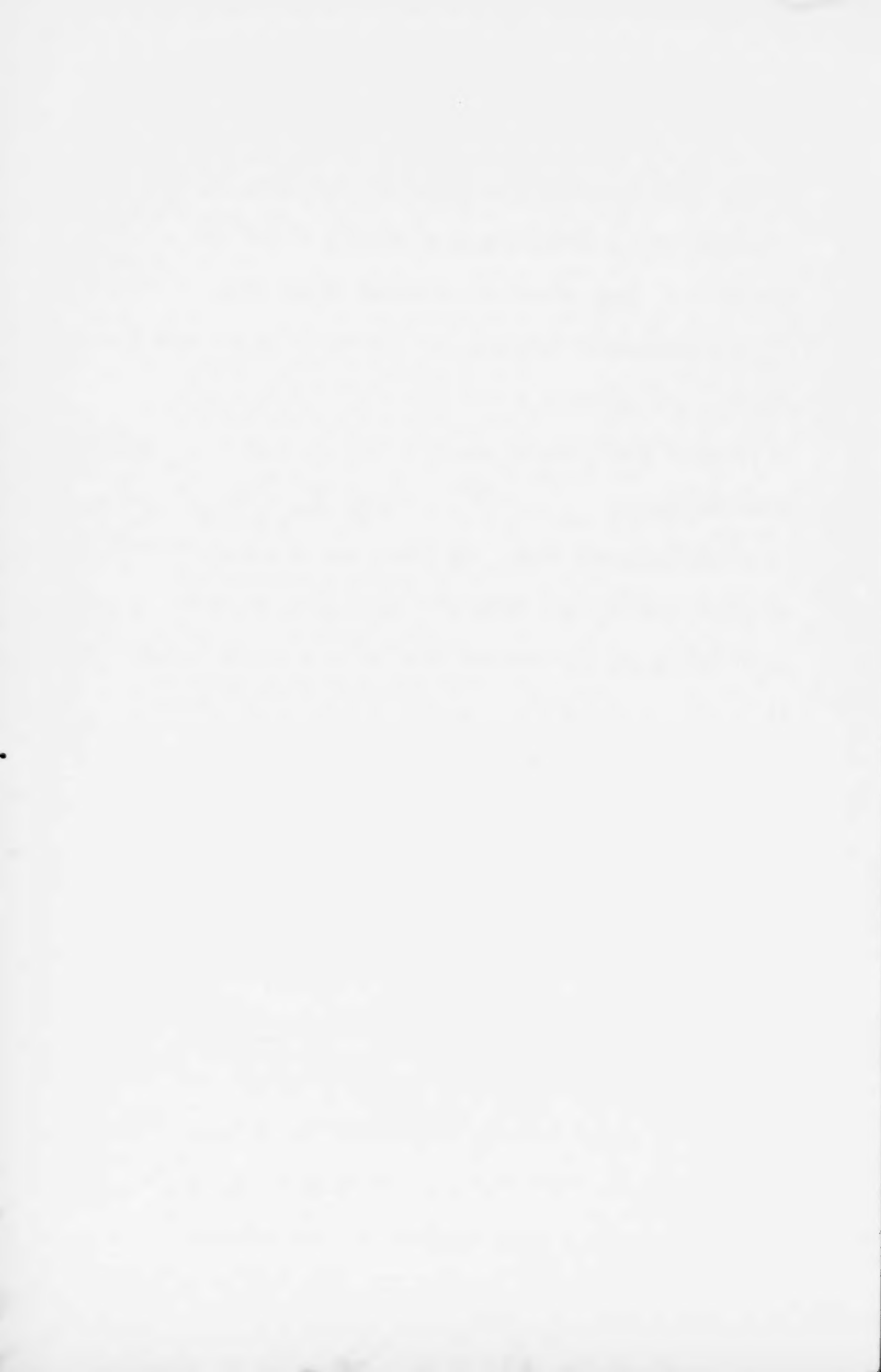
particularly in the absence of antagonistic defenses between Baird and Heimeyer and Forgy, the trial court's refusal to grant the motion to sever was not an abuse of discretion, and this Court will not disturb it on appeal. See McDaniel, supra.

All of the appellants also urge this Court to reverse their convictions because of the trial court's refusal to admit into evidence an adult movie then playing in Texarkana. Appellants offered the film in support of their claim that relaxed community standards regarding pornography existed in Texarkana. The State objected to the film's introduction on irrelevancy, lack of foundation and best evidence grounds. The trial court refused to let the jury see the film, stating, "[T]he jury itself represents the community and is in a (sic) inherent position to apply community standards to



the case before it." The trial judge did permit the manager of the theater then showing the adult film to testify. The manager stated that the film contained scenes of "sexual acts and simulated sexual acts," and that the film was available to adults in the community.

Relevancy rulings are, of course, within the trial court's discretion and will only be reversed for an abuse of that discretion. Hamblin v. State, 268 Ark. 497, 597 S.W.2d 589 (1980). Given the possibility of confusion on the part of the jurors, we do not think the trial judge abused his discretion in refusing to admit the film into evidence. Also, the film should not have been admitted into evidence because the proffered evidence showed only that the film was available in Texarkana. Before a proffer of material is admissible as probative

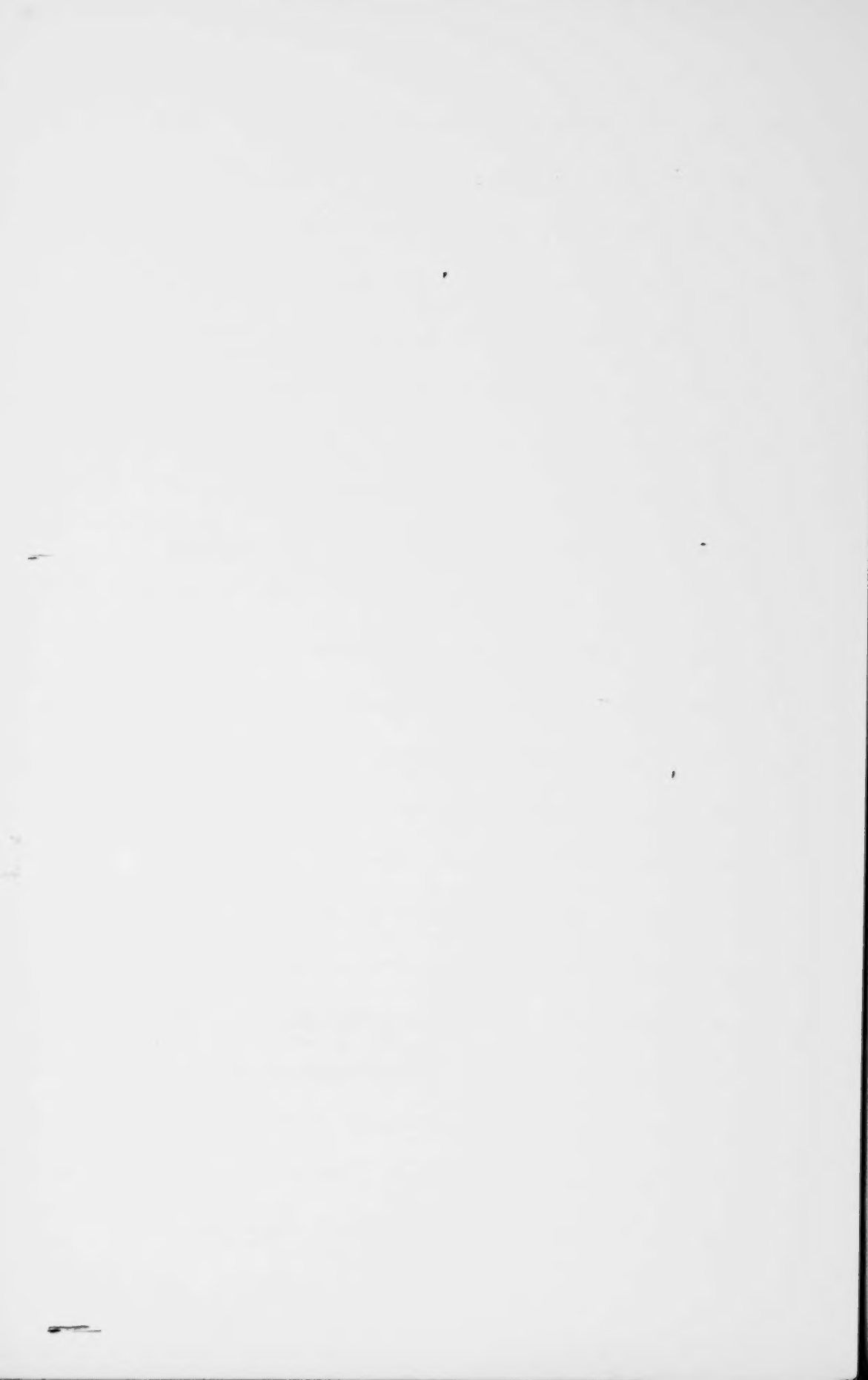


of community standards on obscenity, the proponent must establish a reasonable degree of community acceptance of the proffer of material; however, mere availability in the community of the proffered material does not, of itself, prove the material measures up to the community standard. See Hamling v. United States, 418 U.S. 87, 125-26 (1974); United States v. Pinkus, 579 F.2d 1174, cert. dismissed 439 U.S. 999 (1978).

We now turn to the issue that gives us the most difficulty. Appellants argue that the seizure of the magazines by the police officers violated their rights protected by the First and Fourth Amendments to the United States Constitution. Because the seizure of the magazines was unconstitutional, the appellants contend that the list of the titles of the magazines that was compiled as part



of that seizure was inadmissible against them. Citing Roaden v. Kentucky, 413 U.S. 497 (1973), appellants contend the police seizure of the magazines was unreasonable. In Roaden, a county sheriff in Kentucky viewed a film at a drive-in theater and, based on his own predisposition, concluded that it was obscene. Without a prior determination by an impartial magistrate of the obscene nature of the film or a search warrant, the sheriff arrested the manager of the theater and seized the film. The United States Supreme Court held that such a seizure was invalid. Reiterating that the seizure of books and film arguably protected by the First Amendment is to be assessed in light of a "higher hurdle in the evaluation of reasonableness" than the seizure of dangerous weapons or stolen goods, the Court concluded that police officers should not make this determina-



tion based upon their own subjective determinations of obscenity. In order to fully protect First Amendment rights, the police should let an impartial and neutral magistrate determine whether probable cause exists for the seizure of the alleged obscene materials.

In the instant case, as in Roaden, the police officers had no search warrant when they made the seizure of the allegedly obscene material; there had been no prior independent judicial determination concerning whether the allegedly obscene material was, in fact, obscene and the seizure of the material was based solely on the observations of the police officers. Given the holding of Roaden, we must conclude that the police officers' seizure of the magazines in this case violated the appellants' First Amendment free speech rights and their Fourth Amend-



ment right to be free of unreasonable searches and seizures. See also Gibbs v. State, 255 Ark. 997, 504 S.W.2d 719 (1974). Because the list was part of the unlawful seizure, it, too, must be suppressed. Mapp v. Ohio, 367 U.S. 643 (1961). So long as police officers do not conduct an illegal seizure of material protected by the First Amendment, they are at liberty, just as other members of the public, to enter book stores. Once the police are lawfully present in the book store, they may take notes and compile lists to prepare themselves to go before an impartial magistrate and testify in order to obtain a proper search warrant. That procedure simply was not employed here. Thus, given the doctrine of Roaden, the admission of the list of the magazine titles was error warranting at least a reversal and a remand for a new trial for appellants



Baird and Heimeyer. Forgy's situation differs, and we hold he is not entitled to a new trial even though the list was erroneously admitted into evidence against him. The inadmissibility of the list of the vulgar titles in no way taints the admissibility of the two obscene magazines that Forgy undisputedly sold to the police.¹ The sale of these magazines was not, of course, a "seizure" of the magazines. See Johnson v. State, 351 So.2d 10 (Fla. 1977); Wood v. State, 144 Ga.App. 236, 240 S.W.2d 743 (1977), cert. den. 439 U.S. 899 (1978); State v. Hughes, 519 S.W.2d 19 (Mo. 1975); People v. Peters 82 N.Y.Misc.2d 138, 368 N.Y.S.2d 753 (1975); Carlock v. State, 609 S.W.2d 787 (Tex.Crim.App. 1981).

1

In this appeal, no one challenges the obscenity law under which appellants were charged; nor do they contend the two magazines were not obscene.



Therefore, because the sale of the magazines was not a seizure of protected First Amendment material, the Roaden doctrine does not apply to the admission of the two magazines that were purchased. Even though the list should not have been admitted against Forgy, the evidence, in the form of the two magazines that he sold, is so overwhelming that the error, even if it is of constitutional proportions, is harmless beyond a reasonable doubt. Ark R.Civ.P. 61; Pace v. State, 265 Ark. 712, 580 S.W.2d 689 (1979).

Appellants Baird and Heimeyer also question the sufficiency of the evidence against them as their eighth point for reversal. Given our disposition of their constitutional argument, we will not decide this issue. Vowell v. State, 4 Ark. App. 175, 628 S.W.2d 599, rev'd on other grounds, 276 Ark. 258, 634



S.W.2d 118 (1982).

In sum, because of the constitutional violation of Baird's and Heimeyer's First and Fourth Amendment rights, we reverse their convictions and remand to the trial court. We affirm the conviction of appellant Forgy.

AFFIRMED IN PART AND REVERSED
IN PART.

Cracraft, J., concurs.

Cooper, J., concurs in part and
dissents in part.

Mayfield, C.J., dissents as to
Heimeyer and Baird.



JAMES R. COOPER, Judge, concurring
in part, dissenting in part.

I concur in the majority opinion insofar as it reverses the convictions of the appellants Baird and Heimeyer because of the prejudicial error inherent in the introduction of the list of magazine titles. I respectfully dissent from the majority's affirmance of the appellant Forgy's conviction when that same error is present as to him. Although the majority opinion says it, I disagree that the admitted error was "harmless beyond a reasonable doubt". Two slightly inconsistent rules apply where error occurs in a criminal case: first, the Arkansas Supreme Court has stated that to reverse in a criminal case, the error must be prejudicial, not harmless, and that the appellant must demonstrate error. Wilson v. State, 272 Ark. 361, 614 S.W. 2d 663 (1981). However, the



Supreme Court has also stated that, "[O]ur settled rule is that error is presumed to be prejudicial unless we can say with confidence that it was not." Vaughn and Wilkins v. State, 252 Ark, 505, 479 S.W.2d 873 (1972). Whichever rule one chooses to apply, I think that the introduction of the list was just as much a prejudicial error as to Forgy as it was to the other two appellants. Although there is other evidence against Forgy, I am unwilling to agree that, with confidence, this Court should say that the error was harmless. I would reverse and remand for a new trial for Forgy, as the majority has seen fit to do as to Baird and Heimeyer.



MELVIN MAYFIELD, Chief Judge,

dissenting opinion.

I do not agree with the conclusion of the majority opinion that "given the doctrine of Roaden, the admission of the list of the magazine titles was error warranting . . . a reversal and a remand for a new trial for appellant's Baird and Heimeyer."

The majority holds that the "list was a part of the unlawful seizure" of forty-seven magazines that the police officer took off the rack of the bookstore when they went there with a warrant to arrest the owner of the store. The magazines were not offered in evidence; and, in my view, the list was not even "seized" much the less part of an "unlawful seizure." All the police did to obtain the list was to write the titles of the magazines on a piece of paper. They didn't have to even touch



the magazines to do that. They were rightly in the store and they could stand in front of the rack, read the magnificently descriptive titles, and simply write them down. Indeed, without writing anything, the officers would have to remember only a half-dozen words to adequately describe most of the titles.

The Roaden case has nothing to do with the admission of the officers' list into evidence. The "fruit of the poisonous tree" doctrine does not apply here because the list introduced into evidence did not result from an illegal search, seizure, or arrest. Wong Sun v. United States, 371 U.S. 471 (1963). Baird and Heimeyer do not contend that the forty-seven magazines were not obscene. The evidence supports the convictions. I would affirm.



OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

August 22, 1984

RE: CACR 83-187
Randy Lewis Baird, Henry Edward
Heimeyer and Terry L. Forgy
v. State of Arkansas

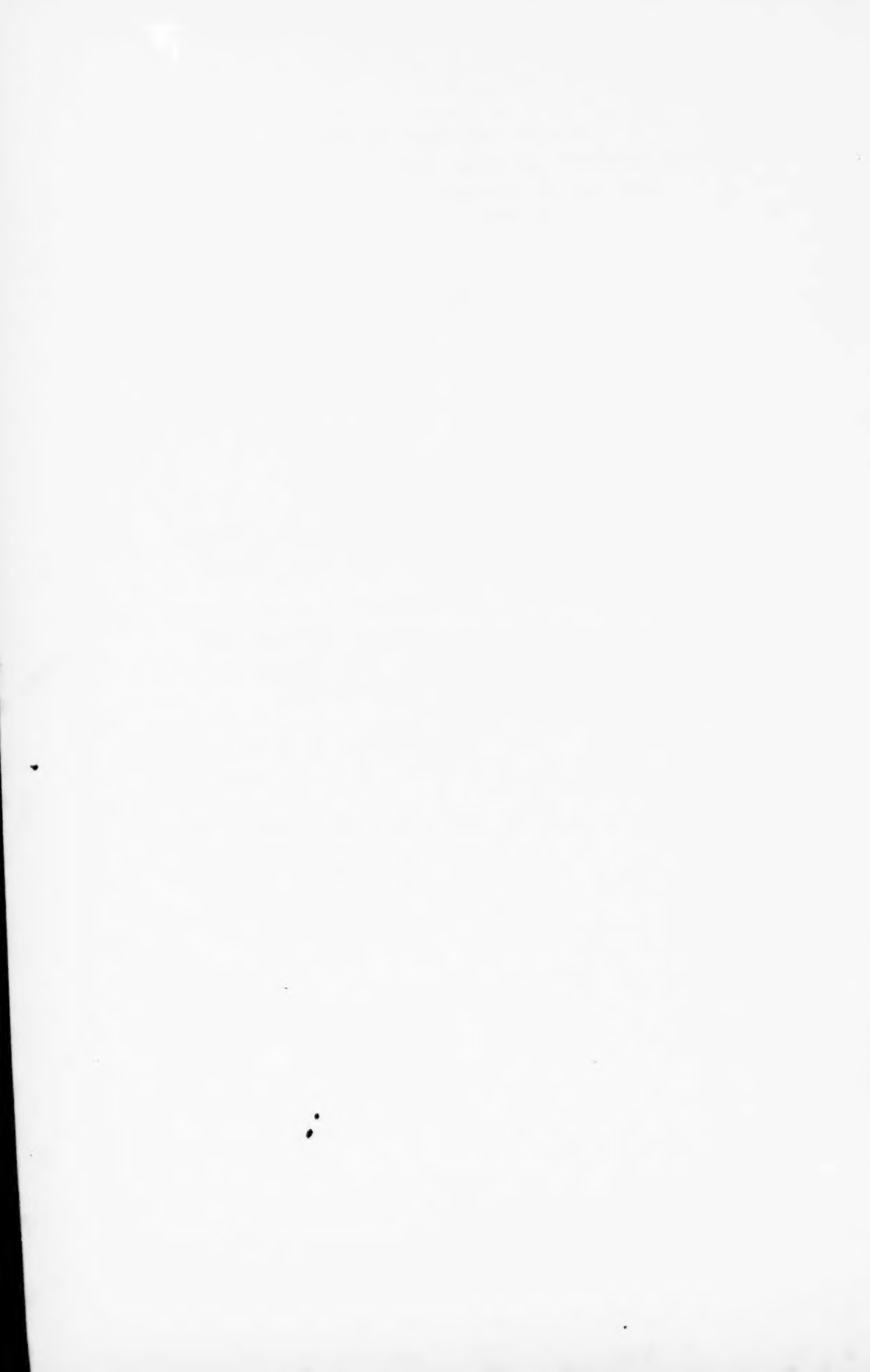
Attorneys of Record:

The Arkansas Court of Appeals made
the following order today in the above
styled case:

"Petition for Rehearing is denied.
Mayfield, J., would grant the State's
petition as to Heimeyer and Baird."

Sincerely yours,

Dona L. Williams /s/



MOTION TO SUPPRESS

COMES NOW the above Defendant, through his attorneys, and respectfully move this Court for an order suppressing from use in evidence all materials heretofore seized.

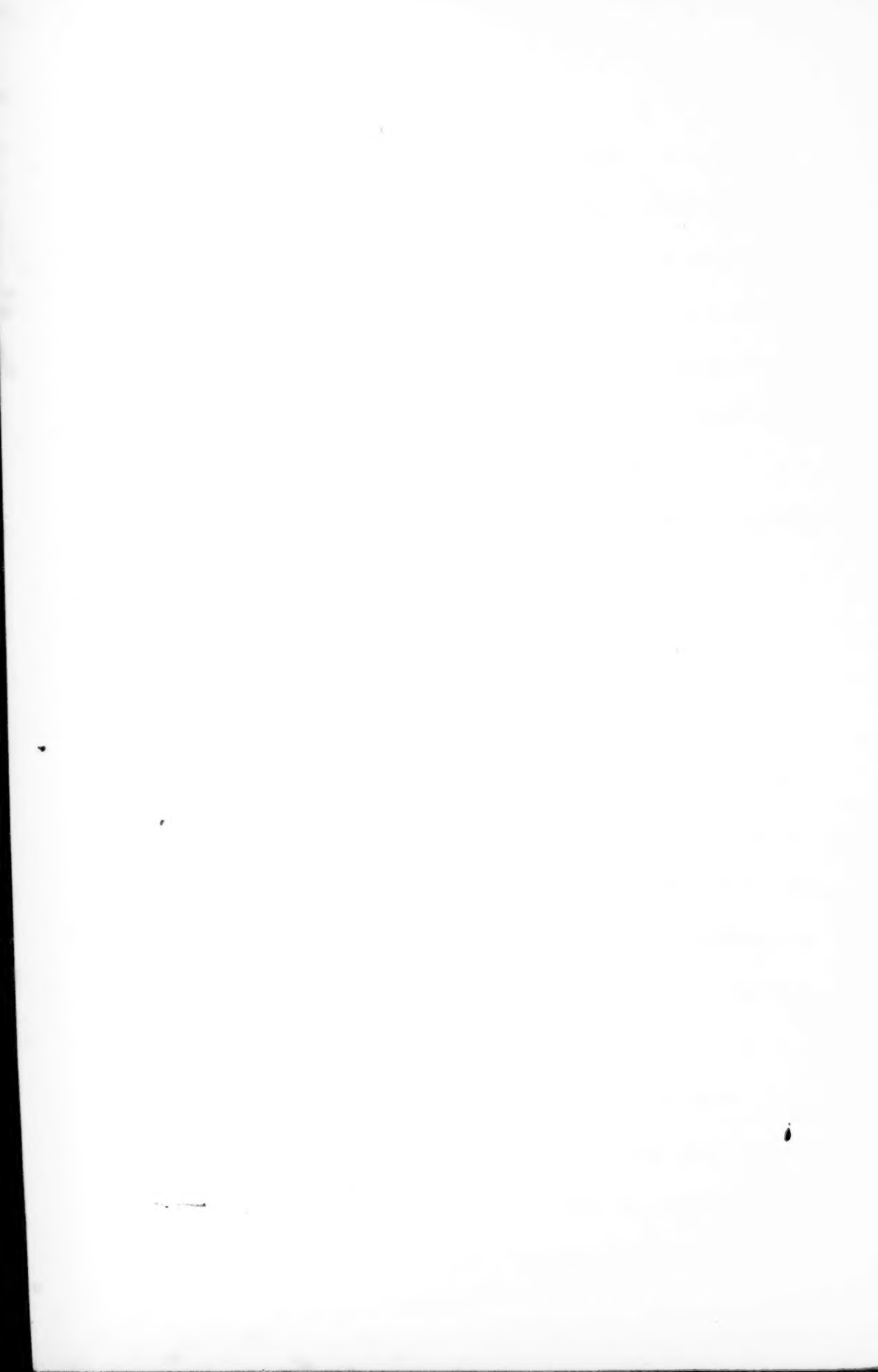
AS GROUNDS FOR SAID MOTION. Defendant state:

I.

The failure to obtain a search warrant resulted in a search of Defendant's premises which was improvident and improper, and ignored the directives of the Supreme Court of the United States as the same allude to the sensitive treatment to be afforded presumptively protected speech material.

II.

The scope of the search was overly broad and permitted a police officer to become the censor of the County of Miller, all in violation of Defendant's



state and federally protected rights.

III.

The lack of a search warrant had the end result of a police officer determining what is, or what is not, obscene, contrary to the mandates of the United States Supreme Court.

IV.

The lack of a search warrant led a mass seizure of presumptively protected material without affording such material a right to a prior hearing concerning the obscenity vel non of same, and violated Defendants' rights of speech and expression.

V.

The failure to obtain a search warrant is contrary to the well established principle that a neutral magistrate failed to focus searchingly on the issue of the obscenity vel non of the material.



WHEREFORE, Defendant prays that the court suppress from use as evidence all materials taken pursuant to said search, and that such materials be forthwith returned to the Defendant as required by law.

Respectfully submitted,

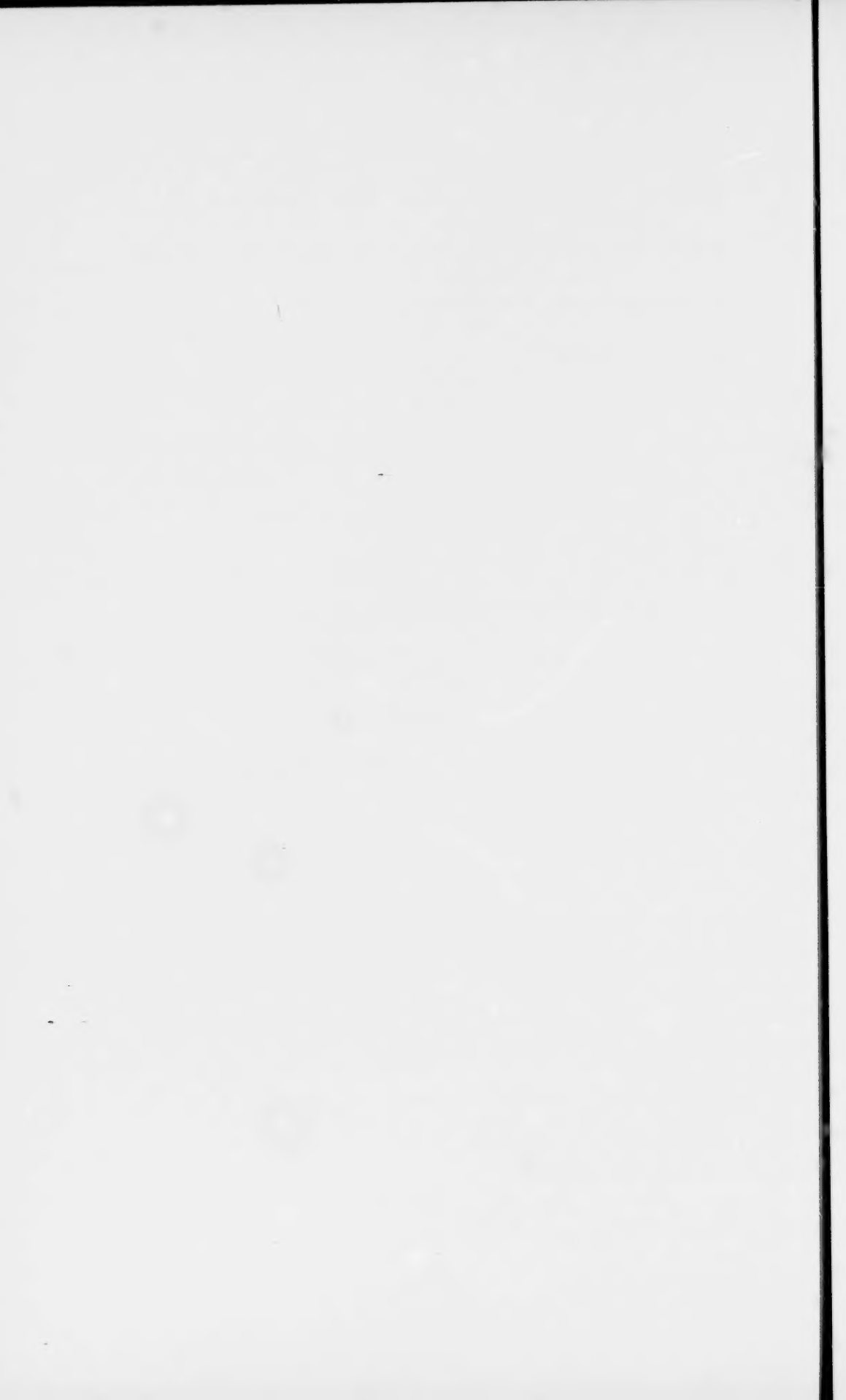
Clyde E. Lee /s/
217, Walnut Str.
Texarkana, Ar 75501

* * *

In the instant case police officers conducted a mass search of the Defendant's premises and seized numerous presumptively protected speech materials without the aid of a search warrant. This precise type of disobedience to the First and Fourteenth Amendments was unequivocally rejected by the United States Supreme Court in Roaden v. Kentucky, 413 U.S. 496 (1973). Because the Defendant believes Roaden is dispositive in favor of his contention that the speech

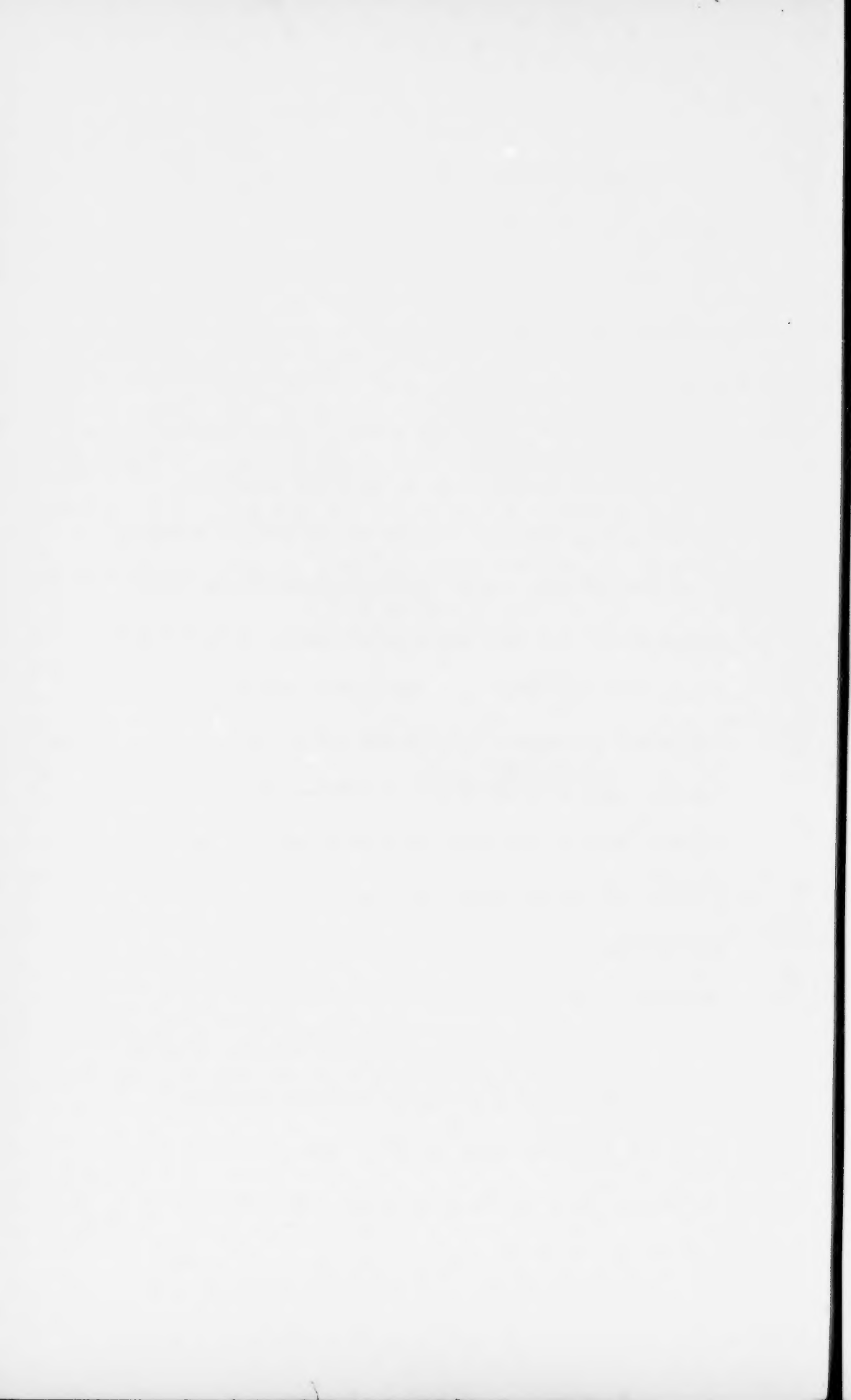
search and seizure in the instant case is constitutionally infirm, it is appropriate to quote that decision at some length.

* * *

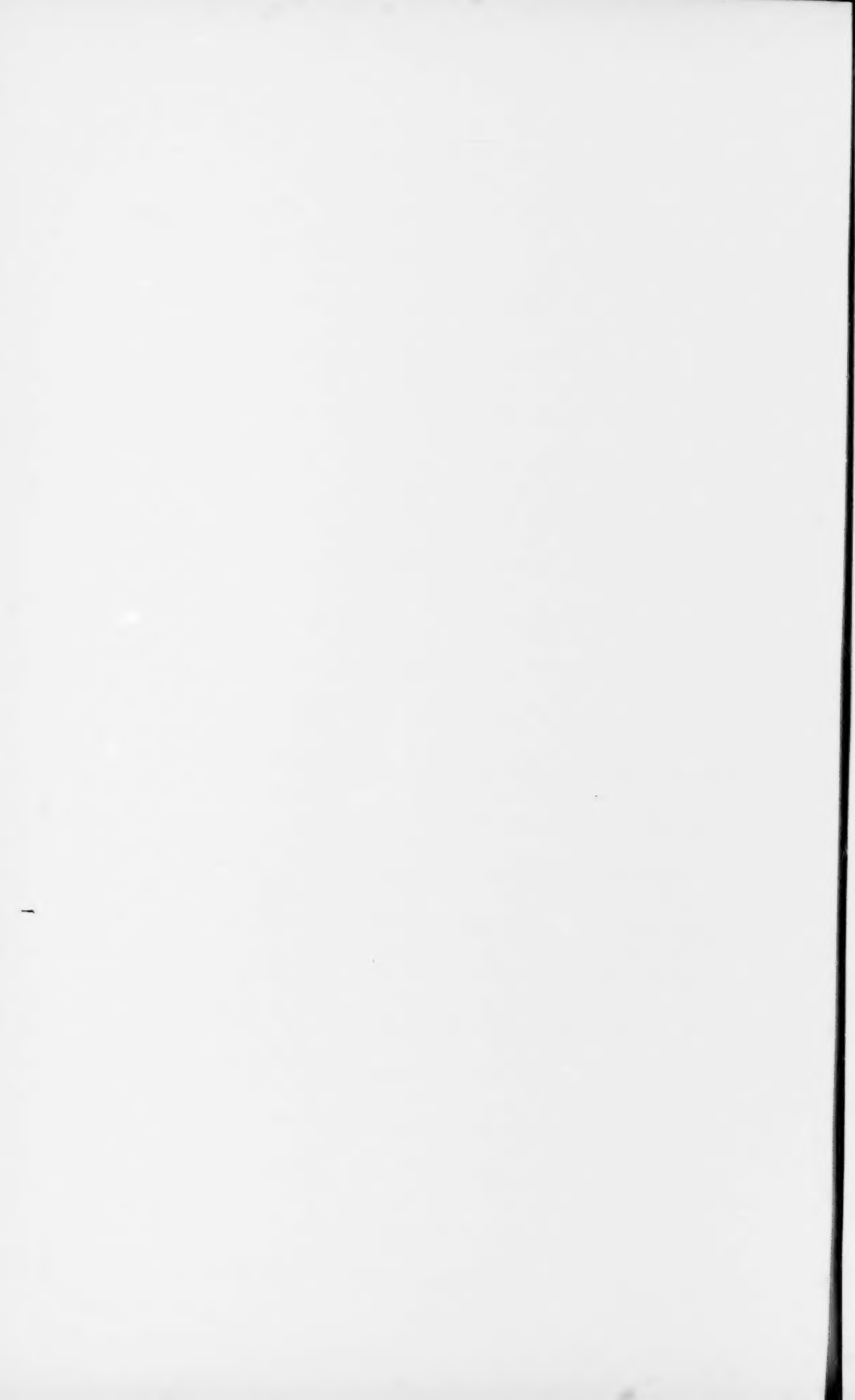


THE COURT: Do you wish to make a statement in closing?

MR. HUDSON: I would like to make a brief statement. First, here is no precedent either in his brief or in the law for holding that every seizure of contraband requires a search warrant. It is well established that under normal circumstances many arrests lead to the detection of obviously illegal materials that can be seized pursuant to that type of arrest. I think the testimony today has shown that a legal arrest under the criminal procedures in the state of Arkansas was made. These two magazines were placed before proper authorities. They were purchased legally, counseling sought and a determination that probable cause existed for an arrest was made. An arrest warrant was issued and in searching



for Mr. Forgy at the only address known to the police at that time, other materials that were obviously pornographic were seized. The arrest warrant was issued through the statutory procedure of having the municipal clerk take the affidavit of the officer or complaining witness and issue a warrant. All of these items were in plain sight at the time the search for Mr. Forgy was made. In fact, Mr. Forgy did arrive at the address before the arrest was over with, I believe, and the evidence is clear that the location of these materials was such that a fifty foot walk would get them out of the jurisdiction of the court. Contrary to the brief and arguments of Mr. Lee, there has been no evidence of a mass seizure. In fact, most of the inventory was left at the book store. Only those materials necessary to a determination of the obscenity question were



taken; one of each, not all of them. And nothing that did not indicate its obscene nature on the cover, on the face, of the material was taken. I think it falls squarely within the requirements of a warrantless search and the materials should be admissible at trial.

* * *

THE COURT: All right, Mr. Lee, as you have stated, alluded to the fact you have filed a brief in support of your Motion to Suppress and of which I was furnished a copy this morning and read it during the noon hour with much interest, as to your Motion to Suppress as to paragraph one, that point is denied, paragraph two is denied, paragraph three is denied, paragraph four is denied, paragraph five is denied.



Based on that, I find that the material is admissible for trial.

END OF JUNE 3RD PROCEEDINGS



PLAINTIFF'S EXHIBIT NO. 2

Taken as evidence from State Line Books
414 State Line Avenue on Monday,
February 28, 1983 at 5:05 P.M.

47 Copies

1. Nookie Nympho
2. The Fucking Suck Sisters
3. Fight'n Juicy
4. Horny Hardon
5. Father Knows Best
6. Voluptua
7. Body Talk
8. Pussies for Sale
9. Baby Cakes
10. Lusty Ladies
11. Cynormus
12. Fringe Benefits
13. Indigo Series
(Crossed out name)
(Crossed out name)
14. Vertigo
15. Mandarin Delights

16. Voluptua # One
17. Sensua
18. Pussy Buster
19. Suckarama
20. Cynormus
21. Penthouse Pussy #1
22. The Ride
23. Maximum #6
24. Indigo Series #3
25. Voluptua #3
(Crossed out name)
26. Lez Pussy Lickers
27. Erotic Dimensions 1
28. Vertigo #2
29. Tit for Two
30. Executive Sweet
31. Oral #1
32. Chinatown Pussy Pusher #1
33. Maximum #8
34. Favors
35. Black Ass Fucker
(Crossed out name)



(Crossed out name)

- 36. Anal Intruders #1
- 37. Sex Goddesses #3
- 38. Oriental Nookie #2
- 39. T.V. Life #1
- 40. Ass Slappin
- 41. Private Lessons #1
- 42. Magnum Griffin #1
- 43. Magnum Griffin #3
- 44. Magnum Griffin #5
- 45. Workout
- 46. Flick Trick
- 47. Super Shaft

Sgt. B. Moore /s/
PSO B. Jones /s/
Randy Baird /s/
Jon Heimeyer /s/

Office - Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-643

**IN THE
SUPREME COURT OF THE
UNITED STATES**

October Term, 1984

STATE OF ARKANSAS

PETITIONER

VS.

RANDY LEWIS BAIRD
HENRY EDWARD HEIMEYER
and TERRY L. FORGY

RESPONDENTS

**ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS**

RESPONDENT TERRY FORGY'S BRIEF IN
OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

ARTHUR M. SCHWARTZ, PC.
Arthur M. Schwartz
1650 Market Street
Denver, Colorado 80202

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE WARRANTLESS SEIZURE OF FORTY-SEVEN PRESUMPTIVELY PROTECTED MAGAZINES WITHOUT ANY PRIOR JUDICIAL EXAMINATION INTO THE ISSUE OF OBSCENITY WAS AN UNCONSTITUTIONAL PRIOR RESTRAINT AND SEIZURE IN VIOLATION OF THE RESPONDENTS' RIGHTS GUARANTEED BY THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

II.

WHETHER THE INVENTORY LIST OF THE TITLES OF FORTY-SEVEN PRESUMPTIVELY PROTECTED MAGAZINES SEIZED UNLAWFULLY DURING A WARRANTLESS SEARCH COULD CONSTITUTIONALLY BE ADMITTED AS DERIVING FROM AN INDEPENDENT SOURCE

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STATEMENT OF THE CASE

Respondents, Terry Forgy, Randy Baird and Henry Heimeyer were charged with violation of Ark. Stat. Ann. Section 41-3553 (Repl. 1977), which prohibits the sale and circulation of obscene periodicals. They were convicted in Texarkana Municipal Court and appealed to the Circuit Court of Miller County. After a trial *de novo* before a jury, they were again convicted. The Arkansas Court of Appeals affirmed the conviction of Forgy, and reversed the convictions of Baird and Heimeyer. From these reversals, the State petitioned this Court for a writ of certiorari.

On February 28, 1983, a Texarkana police major went to Respondent Forgy's bookstore to ostensibly check for an occupational tax permit. The major observed materials he believed to be obscene and returned to the police station where he ordered a police officer to purchase some of these materials. After filling out membership forms and paying a membership fee, the officer purchased two magazines.

At this point, police officers met with Texarkana prosecuting attorneys to discuss the proper means in which to arrest the Respondent and seize allegedly obscene materials. At the meeting it was decided that police officers would obtain an arrest warrant for the Respondent, and upon his arrest, seize a copy of each book and magazine that in the determination of the officers was obscene. At this meeting, the prosecutors and the police officers also determined that the seizure of these allegedly "obscene" books could be justified under the pretext of the "plain view doctrine." (See Appendix, pp. 22-25, 27, 36-37, 40-41).

Pursuant to this plan, the police officers obtained an arrest warrant for the Respondent Forgy issued by a local court clerk. At no point did a neutral and detached magistrate determine if probable cause existed for a determination of obscenity of the material in question or for the

Respondent's arrest. Without any search warrant, the officers proceeded to Respondent's bookstore and seized forty-seven books and magazines from the bookstore that they determined were obscene based solely upon the cover of those materials. (Appendix, p. 7). Many of these magazines were the only copy of that publication available for distribution from Respondent Forgy's establishment. (Appendix, p. 7) During the course of the seizure, the officers made an inventory of the items seized and arrested two of Respondent's Forgy's employees, Respondents Randy Baird and Henry Heimeyer.

All Respondents were charged with violations of Arkansas Stat. Ann., Section 41-3553 (Repl. 1977), which prohibits the sale and circulation of obscene periodicals. In the Circuit Court, the Respondents filed a motion to suppress all materials. This motion was denied. However, at trial, only a list of the titles of the forty-seven magazines seized were introduced into evidence. After Respondent Forgy's conviction in the trial, he brought an appeal to the Arkansas Court of Appeals on six issues. The Court of Appeals refused to consider four of these issues on the basis that Forgy's counsel at trial had failed to object timely during trial. (See p. A5 of Petition for Writ of Certiorari). These issues concerned: (1) the prior repeal of the statute under which Forgy was convicted; (2) the defective jury charge concerning the definition of obscenity; (3) the admission of the irrelevant and highly prejudicial list of titles of the forty-seven magazines seized; and (4) the prosecuting attorney's comments about the Respondent's decision not to testify during closing argument.

On the two issues remaining, the Court of Appeals held: (1) while the seizure of the list of forty-seven magazine titles was unconstitutional under the authority of *Roaden v. Kentucky*, 413 U.S. 497, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973), it was harmless error beyond a reasonable doubt with respect to Respondent Forgy; and (2) the trial court did not abuse its discretion in refusing to admit as

evidence of contemporary community standards another adult film playing in Texarkana, Arkansas.

The State of Arkansas has petitioned this Court for a writ of certiorari on the basis that: (1) the *warrantless seizure* of the forty-seven books on February 28, 1983 was *not* a violation of the First, Fourth and Fourteenth Amendments to the United States Constitution; and (2) the admission into evidence of the inventory list of the titles of the forty-seven magazines seized without a search warrant, was constitutional because this list *could* have been derived from an independent source.

The Respondent submits that these assertions are wholly contrary to the existing body of case law decided by this Court. In essence, the State of Arkansas is asking this Court to reverse many of its own decisions that form the basic foundation for two fundamental components of the Bill of Rights, the First and Fourth Amendments to the United States Constitution.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I:

THE WARRANTLESS SEIZURE OF FORTY-SEVEN PRESUMPTIVELY PROTECTED MAGAZINES BASED UPON THE POLICE OFFICERS' DETERMINATION OF OBSCENITY SOLELY FROM THE COVERS OF THE MAGAZINES WAS A GROSS VIOLATION OF THE RESPONDENT'S RIGHTS GUARANTEED BY THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. *The Warrantless Seizure of Forty-Seven Magazines, Many of Which Were the Only Copy Available at the Bookstore, Was An Impermissible Prior Restraint in Violation of Respondent's First Amendment Rights*

Respondents were charged and convicted of violations of Ark. Stat. Ann. Section 41-3553 (Repl. Vol. 1977), prohibiting the sale of obscene materials. It is undisputed that obscenity is not speech protected by the First Amendment. *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, reh. denied, 414 U.S. 881 (1973). However, it is equally well established that all speech material is presumptively protected by the Constitution until a final judicial determination of obscenity is made. *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789; *Roaden v. Kentucky*, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973). "[T]he First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.'" *Blount v. Rizzi*, 400 U.S. 410, 416, 91 S.Ct. 423, 428, 27 L.Ed.2d 498 (1971) quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). "[T]he line between speech unconditionally guaranteed and

speech which may be regulated, suppressed or punished is finely drawn. ... The separation of legitimate from illegitimate speech calls for ... sensitive tools ...” *Speiser v. Randall*, 357 U.S. 513, at 525, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958). As such, “Any system of prior restraint ... ‘comes to this Court bearing a heavy presumption against its constitutional validity.’” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975) quoting *Bantam Books, Inc. v. Sullivan*, *supra*, 372 U.S. at 70.

In the instant case, the police officers not only failed to employ the required sensitive tools in suppressing presumptively protected speech materials, but, in fact, bludgeoned all significance from the guarantees embodied by the First Amendment. Here, the police engaged in the seizure of forty-seven magazines, without even attempting to procure a search warrant. The officers seized these magazines solely on the basis of their own determination of obscenity without consulting any neutral magistrate on that issue. In making this determination of obscenity, the police officers looked only at the cover of these magazines, without any examination of the magazines as a whole. Although only one copy of each magazine was seized, in many cases that was the sole copy of that magazine within Respondent Forgy’s bookstore. As a result, the distribution of such magazines was, in fact, effectively stopped without any prior judicial determination of obscenity.

This Court in a consistent line of cases, has repeatedly and unequivocally rejected such sweeping and harsh treatment of all materials presumptively protected by the First Amendment. The Court in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), held that a warrant for the seizure of allegedly obscene books could not be “issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene.” 367 U.S. at 731-732. There, the Court stated:

... [T]here was *no step* in the procedure before seizure designed to focus searchingly on the question of obscenity. ... [D]iscretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of constitutional guarantees. *Id.* at 732-733 (Footnotes omitted and emphasis added).

The Court went on to find that the illegal seizure in *Marcus* had imposed a prior restraint upon material presumptively protected by the First Amendment:

But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. ... Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness, and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seized it from him.

(Footnotes omitted and emphasis added). 367 U.S. at 736-737.

See also *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964).

Lee Art Theater v. Virginia, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968) invalidated the seizure of a film from a commercial theatre regularly open to the public. Following *Marcus*, the Court stated:

[t]he procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure "designed to focus searchingly on the question of obscenity," Id. [Marcus v. Search Warrant., supra] at 732, 6 L.Ed.2d 1127, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression.' Lee Art Theatre v. Virginia, 392 U.S. at 637. (Emphasis added).

The reasoning in these decisions reached its culmination in *Roaden v. Kentucky*, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973). The facts in *Roaden*, strikingly similar to the case at bar, involved the seizure of a film by a local sheriff, based upon alleged obscenity, after he had observed the film in its entirety. It was undisputed:

(a) that the sheriff had no warrant when he made the arrest and seizure, (b) that there had been no prior determination by a judicial officer on the question of obscenity, and (c) that the arrest was based solely on the sheriff's observing the exhibition of the film. *Roaden v. Kentucky*, 413 U.S. at 498-499.

The defendant moved to suppress the film, which motion was denied. At trial, a jury convicted the defendant of

exhibiting an obscene film. The Supreme Court unanimously reversed the conviction.

In holding that the film must be suppressed, Chief Justice Burger in writing for the majority, began the analysis by stating:

The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' (citation omitted), *are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards. Roaden v. Kentucky, supra, at 502. (Emphasis added).*

After a discussion of *Marcus, A Quantity of Books* and *Lee Art Theatre* in relation to this principle the Court stated:

The common thread of *Marcus, A Quantity of Books* and *Lee Art Theatre* is to be found in the nature of the materials seized and the setting in which they were taken. *See Stanford v. Texas, 379 U.S. 476, 486, 13 L.Ed.2d 431, 85 S.Ct. 506 (1975).* *In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle*

in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression. As we stated in *Stanford v. Texas*, *supra*:

'In short ... the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. See *Marcus v. Search Warrant*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708; *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.' 379 U.S. at 485, 13 L.Ed.2d 431. (Footnotes omitted and emphasis added).

Against this backdrop this Court concluded in no uncertain terms that:

If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori*, The officer may not make such a seizure with no warrant at all. *Roaden v. Kentucky*, *supra*, at 506. (Emphasis added).

The vitality of the *Roaden* decision has remained intact. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) the United States Supreme Court in Justice White's majority opinion reiterated these principles:

Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field. Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to
* arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to 'focus searchingly on the question of obscenity' (Citations omitted).

More recently, the Court unanimously rejected the seizure of allegedly obscene materials pursuant to an open-ended search warrant in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979).

These consistent, unequivocal statements indicate that the questions presented in the Petition for Certiorari have been resolved by this Court many times over. Moreover, *Marcus* and *Roaden* explicitly state the minimum constitutional requirements for such a seizure of presumptively protected material which include a determination of probable cause by a neutral magistrate *prior* to seizure, followed by a prompt post-seizure judicial determination of the obscenity issue.

None of these procedures were followed in this case. The police officers never attempted to obtain a search warrant. No determination of probable cause was ever made by any neutral magistrate. Instead, the officers relied only on their own unfettered discretion in determining which magazines were obscene. The Petitioner attempts to justify this complete disregard of the required procedures by asserting that the police officers used "fairly objective standards" in the determination of obscenity. However, *Marcus* explicitly required far more than just "fairly objective standards" employed by police officers in

requiring a neutral magistrate to focus “searchingly on the issue of obscenity.”

In addition, precisely the same type of prior restraint exists in the instant case as in *Roaden*. While Petitioner takes pains to point out that only one copy of each magazine was seized, it neglects to state that, in many cases, the single copy seized was, in fact, the only copy in Respondent’s bookstore. Thus, contrary to Petitioner’s assertions, the seizure, in fact, “brought to an abrupt halt [the] orderly and presumptively legitimate distribution or exhibition” of many magazines sold at Respondent’s establishment. *Roaden*, 413 U.S. at 504.

However, the constitutional violations did not end there. The police officers did not even attempt to comply with the well established three part test for obscenity enunciated by this Court in *Miller v. California*, 413 U.S. 16, at 431 (1973). This test is:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. at 431. (Citations omitted).

Here, the police officers seized all materials from the bookstore that appeared to be sexually explicit solely on the basis of the cover of the magazine. Absolutely no effort was made by the officers to examine these presumptively protected materials “as a whole” making it impossible for the police to make a proper determination of the obscenity of these magazines. Even the sheriff in *Roaden* viewed the entire film before he made the warrantless seizure that

was rejected by this Court.

It is almost inconceivable how Petitioner can honestly argue that the seizure of presumptively protected speech materials in the instant case was reasonable. This Court has repeatedly and unequivocally enunciated the controlling principles of such seizures. Here, the police officers completely failed to apply these "sensitive tools" required by this Court in seizing these magazines and instead, created their own procedures which they applied to the Respondent with the subtlety of a sledgehammer. As such, this seizure presents an even more egregious factual situation than that rejected by this Court unanimously in *Roaden v. Kentucky*. Petitioner is requesting this Court, in essence, to set aside almost the entire body of First Amendment law that has been so carefully crafted by this Court for decades. For these reasons, the Petition for Certiorari should be denied.

B. *The Warrantless Seizure of Forty-Seven Magazines Was an Unreasonable Seizure in Violation of the Fourth Amendment to the United States Constitution*

The requirements of the Fourth Amendment must be applied with "the most scrupulous exactitude" where the items sought to be seized are presumptively protected by the First Amendment. *Stanford v. Texas, supra*; *Roaden v. Kentucky, supra*. Thus, even if the warrantless seizure of magazines from Respondent's bookstore was not a prior restraint in violation of the First Amendment, it would still constitute an unreasonable search in violation of the Fourth Amendment.

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that *'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and*

well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 (1968); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (Footnotes omitted and emphasis added).

Petitioner attempts to justify the seizure by asserting that the magazines were in plain view. However, there are two significant limitations to the "plain view" doctrine. The first of these is:

... that plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle ... that no amount of probable cause can justify a warrantless search absent 'exigent circumstances' ... [E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that police may not enter and make a warrantless seizure. (Citations omitted). *Coolidge v. New Hampshire*, 403 U.S. 443, at 468, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) *reh. denied* 404 U.S. 874.

Petitioner argues that exigent circumstances existed here since due to the proximity of Respondent's bookstore to the state line, evidence could be destroyed "by simply walking across the street." Petitioner's Argument, p. 5. Petitioner contends, in essence, that the Fourth Amendment simply does not apply to businesses or residences that are located within sixty feet of the state line. This argument is patently absurd.

Moreover, this Court has frequently stated that "a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, 437 U.S. 385, at 393, 37 L.Ed.2d 290, 98 S.Ct. 2708 (1978) quoting *Terry v. Ohio*, 392 U.S. 1, 25-26, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Here, no exigency ever existed to initiate this warrantless search. The manufactured justification

for the warrantless search presented by Petitioner, after the fact, cannot validate this warrantless seizure that was unreasonable from its outset. Moreover, this argument is not supported by the facts since an officer who participated in the seizure testified during the suppression hearing that he never considered the possibility that evidence would be destroyed by crossing the state line. (Appendix, p. 15).

The second limitation on the "plain view" doctrine is that the discovery of evidence in plain view must be inadvertent.

But, where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatsoever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable in the absence of 'exigent circumstances.' Coolidge v. New Hampshire, supra, at 470. (Emphasis added).

The seizure in the instant case cannot in any way be characterized as inadvertent. Here, police officers met with Texarkana prosecutors prior to the seizure to plan the seizure of items from Respondent's bookstore. Moreover, there can be no question that the officers were aware they would find the seized magazines at the bookstore. (Appendix, pp. 7-8).

Petitioner also apparently tries to justify the seizure as incident to a lawful arrest since the officers had obtained a warrant for the arrest of Respondent Forgy. However, in cases involving presumptively protected speech materials, probable cause for an arrest cannot exist without a prior judicial determination of obscenity. The determination of probable cause for arrest in such cases cannot be left to

the discretion of a police officer. “[T]he judgment of an arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest,” where seizure is sought of presumptively protected materials. *Zurcher v. Stanford Daily*, *supra*, at 564. (Emphasis added). Moreover, the seizure of forty-seven magazines cannot be justified under *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969) since there was no imminent threat to the police officers’ safety and no indication that any Respondent intended to destroy evidence.

Petitioner also suggests that Respondent Forgy had no legitimate expectation of privacy against government intrusion since his bookstore was open to the public. However, this argument was rejected in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2379 (1979). There the Chief Justice, in writing for a unanimous Court, stated:

The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, and that accordingly no warrant was needed. But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. (Citations omitted) *Lo-Ji Sales, Inc. v. New York*, 442 U.S. at 329.

As seen, every reason Petitioner has advanced to justify this warrantless seizure of presumptively protected speech materials is without merit under established Fourth Amendment principles. Thus, not only did this warrantless seizure make a mockery of First Amendment protections, but it also clearly violated the Fourth Amendment. Therefore, the Arkansas Court of Appeals correctly held the

warrantless seizure of magazines from Respondent's bookstore was unconstitutional.

II.

THE INVENTORY LIST OF THE TITLES OF FORTY-SEVEN MAGAZINES UNLAWFULLY SEIZED IS NOT ADMISSIBLE SINCE THE PETITIONER HAS FAILED TO MAKE ANY SHOWING THAT THE LIST WAS OBTAINED FROM AN INDEPENDENT SOURCE

Petitioner contends that the inventory list of the titles of the forty-seven magazines seized without a warrant should not be excluded from evidence. As authority for this contention, Petitioner cites *Nix v. Williams*, _____ U.S. _____, 81 L.Ed.2d 377, 104 S.Ct. _____ (1984); and *Segura v. United States*, _____ U.S. _____, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984) which enunciated, respectively, the related concepts of "inevitable discovery" and "independent source" in connection with the exclusionary rule. Ignoring the fact that the relevance of the list of magazine titles to these obscenity prosecutions is highly questionable, Petitioner's reliance on these cases is misplaced.

In both of these cases, this Court had a solid foundation of facts upon which to make the determination that certain evidence could be admitted. Here, however, Petitioner is asking to admit into evidence a list of titles based solely on the basis of speculation concerning what *might* have been.

Segura v. United States, *supra*, enunciated the independent source exception to the exclusionary rule. It must be noted that the Court stated at the outset of the opinion that "Our disposition of both questions is carefully limited," 82 L.Ed.2d at 604. *Segura* held that evidence seized pursuant to a valid search warrant was not tainted by an

earlier illegal entry into the property. The factual situation underlying this decision was well established:

None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. *It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged.* This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a '*means sufficiently distinguishable*' to purge the evidence of any 'taint' arising from the entry. *Wong Sun*, 371 U.S. at 488, 9 L.Ed.2d 441, 83 S.Ct. 407. Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here. (Footnotes omitted and ~~em~~phasis added). *Segura v. United States*, *supra*, 82 L.Ed.2d at 614-615.

Thus, in *Segura*, a discrete division existed between the unlawful police activities and the evidence seized pursuant to a valid search warrant.

The inevitable discovery rule set forth in *Nix v. Williams* also required a definite showing by the government:

Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, *if the government can prove* that the evidence *would* have been obtained inevitably and, therefore, *would* have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. [Emphasis added]. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position that it would have occupied without any police misconduct. [Emphasis by Court]. *Nix v. Williams*, 81 L.Ed.2d at 389-390.

Under this test, the government was required to *prove* that the body of the murder victim *would* have been inevitably discovered. In *Nix* the government met its burden of proof by producing substantial evidence that was extensively discussed by the Court.

In stark contrast to *Nix* and *Segura*, Petitioner in the instant case advances only speculation and sophistry to support its argument. Here, the inventory list of titles is not only connected to a blatantly illegal search, it is, in fact, a manifestation of that unconstitutional conduct. Absolutely no discrete division exists between the unlawful police conduct and the evidence sought to be admitted. There exists no "means sufficiently distinguishable" to purge the list of titles of any taint arising from the warrantless search. *Segura*, 82 L.Ed.2d at 615.

Petitioner has advanced no concrete evidence that the list of titles *would* inevitably have been obtained without any illegality. Throughout its argument, Petitioner argues that the list of titles *could* have been obtained lawfully.

Petitioner advances no evidence that indicates that it has actually obtained a list of book titles at any time, and ever used a list of titles to prosecute any individual for promoting obscenity. As a result, this argument must fall since it is based on nothing more than speculation about how the police officers, in theory, *could* have acted.

Moreover, the use of such speculation significantly damages the fairness rationale underlying the inevitable discovery test as articulated in *Nix*. If the Court were to adopt the position advanced by Petitioner, this fairness analysis would become meaningless since the government could obtain evidence illegally and justify it by creating a purely hypothetical situation where the government *could* inevitably discover the evidence lawfully. That is exactly what Petitioner seeks to do here.

Therefore, the adoption of Petitioner's argument in the instant case would destroy the sharp distinctions that are made clear in the *Segura* and *Nix* opinions. Moreover, since Petitioner cannot produce any evidence other than hypotheticals of what the police could have done, the argument must fall. Indeed, Petitioner asserts that the list of titles could have been used in obtaining a search warrant. However, it is clear from *Marcus*, *Roaden*, and the other cases discussed *supra*, this list of titles alone would not be sufficient to support a finding of probable cause for a search warrant for any single magazine on the list. Petitioner's argument is, thus, anomalous since it seeks to have admitted into evidence of the substantive offense, a list of titles that could not even support a showing of probable cause. Based on the arguments presented by Petitioners on this issue, no significant reason exists for this Court to grant the Petition for Certiorari.

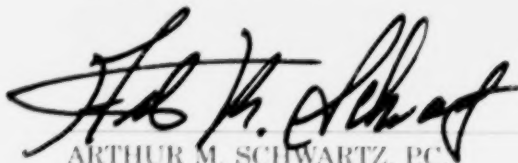
CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on a writ of certiorari "will be granted only when there are special and important reasons" for review. No special and important reason exists in the instant case.

An unbroken line of cases from *Marcus* to *Roaden* and beyond, clearly indicates that the procedures employed by the police officers in dealing with presumptively protected speech material in this case were constitutionally deficient. Based on these decisions, there is little question that the Arkansas Court of Appeals correctly held that the seizure of the forty-seven magazines was unconstitutional. Moreover, *Segura* and *Nix* present vastly different factual situations from the instant case that justify the limited independent source and inevitable discovery exceptions to the exclusionary rule. In the instant case, Petitioner relies solely on speculation to make *Segura* and *Nix* even arguably applicable.

Therefore, Respondent Terry Forgy, respectfully requests that this Honorable Court deny the State of Arkansas' Petition for Certiorari and grant any other relief it deems fit to correct the gross constitutional violations that occurred in this case.

Respectfully submitted,



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MOTION TO SUPPRESS, JUNE 3, 1983

SGT. BILL MOORE,

called as a witness in behalf of the defendants, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEE:

Q Please state your name.

A Sgt. Bill Moore.

Q Mr. Moore, on or about 4-13-83 were you working for the Texarkana, Arkansas Police Department?

A Yes, sir. I was.

Q Did you have occasion on that day to go to a place known as State Line Books?

A Yes, sir.

Q Could you tell the Court approximately what time you arrived at those premises?

A It must have been four o'clock in the afternoon. I'm guessing from the time on my inventory sheet says 5:05; approximately an hour before that.

Q So, your answer is approximately an hour before the time on your inventory sheets?

A Just an approximate guess; I don't know exactly what time I checked out.

Q Officer, do you recall what happened when you first walked into the premises?

A Major Cowart was in the lead. I was behind—I think I was behind him; I'm not sure. Capt. Zane Gray, Lt. Allen Hartshorn and Officer Billy Jones were also with us, and I think I was behind Cowart; I can't remember.

Q At that particular time, do you know whether or not either of the officers were in possession of a search warrant?

A I wasn't in possession of a search warrant, and I don't believe anybody else was.

Q What was your purpose for going to the book store?

A To serve an arrest warrant on Terry L. Forgy.

Q Was it at any particular time prior to the seizure of the materials explained to you and Mr. Forgy was not at the store?

A No.

Q Do you recall whether it was explained to any of the other officers?

A To my knowledge, no; I don't know.

Q Presumably, Officer Moore, at some particular instance you looked for Mr. Forgy, is that correct?

A Uh-huh.

Q He was not there, is that correct?

A He was not.

Q Do you recall where you looked for him?

A Spoke to Mr. Baird, who was behind the counter.

Q So, it is not your contention, then, that upon entering the store there was any reason to believe that Mr. Forgy was hiding on the premises?

A I wouldn't have known Mr. Forgy if he had come up and punched me in the nose until I saw him later. I had never laid eyes on the man.

Q Now, think carefully, Mr. Moore. Prior to entering the store, anytime prior to entering the store, was the discussion of seizing materials on the rack ever conducted in your presence?

A Yes.

Q By whom?

A Major Cowart, myself; I don't know if Sgt. Adcock was present then or not.

Q When did this discussion take place?

A We were trying to figure out the correct procedure on making the arrest and seizing any material that under the statute appeared obscene. We went to Mr. McDaniel's office and consulted him and Kirk Johnson both. Mr. McDaniel called somebody. If you want me to

assume, I will.

Q No, I'm not asking you to assume something.

A Okay, he make a telephone call and obtained some legal advice.

Q Mr. McDaniel is the deputy prosecutor for Miller County, is that correct?

A Right.

Q To your knowledge, no judge was ever consulted with regard to these matters prior to the seizure, is that correct?

A Prior to the seizure?

Q Yes, sir.

A We went to contact Judge Purifoy, and he directed us to Mr. McDaniel and Kirk Johnson.

Q Did you, or did any of the other officers, ask Judge Purifoy for a search warrant?

A Oh, Lord. We were wanting to know what the legalities were, whether we did need a search warrant if the material was on the racks. That's what we were trying to find out, what we needed.

Q But you never asked for a search warrant?

A Right off the top of my head I can't remember.

Q Was there any reason for you not asking for a search warrant?

A If the material was in plain view, that's one reason.

Q If the material was in plain view, that's one reason?

A Right.

Q But this was prior to you going into the store, is that correct?

A Uh-huh.

[Objection to leading question sustained]

Q (By Mr. Lee) Officer, how long have you been on the Texarkana, Arkansas Police Department?

A A little over six years now.

Q Have you been involved in the seizing of materials with a search warrant?

A Yes, I have.

Q You know the procedures for obtaining a search warrant?

A Yes, I do.

Q Do you feel that those procedures are overburdensome?

A In some instances, yes.

Q In some instances?

A Uh-huh.

Q Officer, based on the facts as you knew them to be on the day of the seizure, did you feel that there was any reason why there could not be a search warrant obtained for those premises?

A Well, I'm a law enforcement officer. I'm not a lawyer. I consulted two lawyers that day. Now, you tell me.

Q So, it's your statement that two lawyers informed you that you didn't need a search warrant?

A Yes, that's right.

Q So, that determination was made by the two lawyers and the police officers that were involved?

A By the two lawyers involved.

Q By the two lawyers involved?

A Right.

* * * *

CROSS EXAMINATION

BY MR. HUDSON:

Q Sgt. Moore, did you make inquiry of Assistant Prosecutor McDaniels and Prosecuting Attorney Kirk Johnson as to the proper way to make an arrest of Mr. Forgy in this case?

A Yes, sir, I did.

Q You had been informed before the arrest was made that there were alleged pornographic materials in the store, is that co-rect (sic)?

A Yes.

Q What other steps did you take to assure that you were making a legal arrest of Mr. Forgy that day?

A I went to the city collector's office and obtained Mr. Forgy's name from the occupational tax form that he filled out when you pay the occupational tax.

Q Did he have any address on that form other than the adult book store address?

A No, sir, he does not.

Q At that time, did you know of any place to find Mr. Forgy other than at the adult book store?

A No, sir.

[Objection overruled]

Q (By Mr. Hudson) Do you normally just ask the first person that answers the door whether the suspect is there, and if they say no, you go on your way looking some place else?

A No, sure don't.

Q When Mr. Baird told you that Mr. Forgy was not there, did you feel obliged to take his word for that?

A No, I didn't.

Q Was there any reason for going past this so-called second door other than to look for Mr. Forgy?

A None.

Q When you passed the second door, what was the first thing you saw, or, if you could, describe the room that you saw there.

A When you clear the second door, the rooms open up. As you walk in the door, in front of you and kind of to the right against the wall there is a case, and then, on the wall that you are looking at, there is racks of magazines. Then, to your left, just kind of around and to the left there is another counter there of which Mr. Baird was behind.

Q Was Mr. Heimeyer there at that time?

A No, I believe he came in a short time after that.

Q Could you see what was on the cover of these magazines when you walked into the second room, or into the room?

A When you cleared the second door and I got up closer, yes, I could.

Q Armed with the definitions of the instructions that you had from the prosecutors, did you make a determination as to whether these magazines were obscene under the Arkansas Statutes?

A The way I had it explained to me, yes, I did.

[Magazines marked for identification as Exhibit 1 over Defense Counsel's objection and identified by the witness]

* * * *

Q As I understand it, you saw these and made a determination that in your judgment they were in violation of the obscenity statute from the cover of each of these magazines?

A Yes, sir.

Q Did you compile a list of these?

A Yes, sir, I did.

[Exhibit 2, the inventory list of magazine titles is identified. Exhibits 1 and 2 admitted over defense counsel's

objection. See pp. A29-A31 of Petition for Writ of Certiorari Exhibit 3, Arrest Warrant for Terry Forgý admitted into evidence]

Q Did you all leave anything in the store when you left after the arrest?

A Yes, sir.

Q What items did you have?

A My orders were to seize one copy of any magazine that showed explicit sex acts on the front cover. We did that, and Mr. Baird even stood there and he assisted me to make sure that I did not get two of each.

Q Do you remember whether you took the last one of any of their stock of magazines?

A I believe that there were some copies that there was only one in the rack.

Q Did you take any films or any video tapes or anything like that?

A No, sir. I did not.

Q Did you take any of their so-called novelty items?

A No, sir.

Q What was the criteria you used to determine whether these magazines were obscene or not under the Arkansas statute?

A The way I was briefed was if the magazine showed any explicit sex acts on the cover; that strictly nudity was not considered obscene, that it had to show penetration and explicit sex acts, and/or.

MR. HUDSON: Pass the witness.

REDIRECT EXAMINATION

BY MR. LEE:

[Objection to leading question sustained]

Q (By Mr. Lee) Officer Moore, you stated upon cross examination by Mr. Hudson that you were briefed to take any magazines that showed explicit sex acts from the shelves, is that correct?

A Okay, explicit sex acts, yes, but rather than clean all the material out, we were to take one copy of each. That's the continuation of that statement; I'm sorry.

Q So, you, at the particular point you were standing inside the store, and I assume the other officers were also so briefed; they were all functioning with similar definitions?

A Right.

[The objections to leading questions sustained]

Q (By Mr. Lee) Officer Moore, how long did it take you to determine which magazines you were going to take?

A As far as determining the magazines to be taken, it wasn't that long. The longest part was the inventory.

Q The longest part was the inventory?

A Right.

Q Was there any discussion between the officers that were in the book store as to which magazines to take?

A I think, I don't know whether it was Captain Gray or Lt. Hartshorn, they picked up a couple of magazines and if they were showing naked torsos, bodies, and by what I had been told and the orders I was getting that wasn't considered obscene and they were put back on the rack.

Q Are you aware that the same statute that you were functioning under also covered items other than the ones that were taken?

A No, sir, I did not know it.

I believe Major Cowart walked to behind the counter, looked behind the counter. There is another room in the place. I don't know if anybody went in there and looked or not then. There is a door inside the second door; there is another door that goes to the right.

Q Did you go into the room?

A No, I didn't; sure didn't.

Q Was that because [sic] you believed Mr. Baird when he said Mr. Forgy wasn't there?

A Well, I'll tell you what: The thing about it then, I wasn't doing the talking. Major Cowart was doing the talking. He was the officer in charge of the raid, the arrest, okay? Raid, arrest, whatever you would like to phrase it as.

Q But, if your purpose was to arrest Mr. Forgy, my question to you is once you entered the store did you go behind [sic] Mr. Baird's statement in looking for Mr. Forgy on the premises?

[Objection overruled]

A I did not. I was standing there waiting to see what the events were, okay? I was just kind of standing in the center of the room there, and I was looking at him and Major Cowart talking.

Q (By Mr. Lee) At some particular point, apparently the officers inside the place, including yourself, were satisfied that Mr. Forgy wasn't there. Is that a correct statement of the events?

A I would imagine, yes.

[Objection to leading question sustained]

Q (By Mr. Lee) Officer Moore, did you go there with the twofold purpose of arresting Mr. Forgy and seizing materials, or did you go there strictly to arrest Mr. Forgy?

A We went there to arrest Mr. Forgy, and if there was any

material the caliber of what Sgt. Adcock had purchased and it was in plain view, yes, sir, we were going to get it, that's right.

MR. LEE: No further questions, Your Honor. Pass the witness.

Q Have you ever conducted a search similar to this before?

A You mean of obscene material?

Q Yes, sir.

A No.

Q This is the first time you had ever been called on to interpret that statute?

A Yes, it is.

Q What is the geographical location of that book store in relationship to the city court house?

A To the city court house?

Q Yes, sir.

A You mean how many blocks?

Q Yes, sir.

A Four blocks; three and a half, I guess; up one over two and then up about a half, maybe a block.

Q Do you know whether or not the city judge was ever available during the day of the 13th?

A I don't know whether he was in his office.

Q Did you check?

A No, sir, I didn't.

Q Did any of your fellow officers check?

A I wouldn't know.

[Objection to leading question sustained]

Q (By Mr. Lee) You stated that you obtained the warrant of arrest for Mr. Forgy on cross examination?

A Yes, I did.

Q Officer Moore, could you tell the Court, other than this nebulous plain-view doctrine, could you tell the Court any reason why prior to going in the store you didn't try to obtain a search warrant?

A As I have stated, I was going by the information given me by, I would assume, they are two of the chief advisors of the county, the prosecuting attorney and the deputy prosecuting attorney. That's what information I was operating on and the reason we came over to the

county building was to try to figure out how to go down there, make the arrest, and what course of action we should take concerning the materials that were in the store.

[Objection to leading question sustained]

Q (By Mr. Lee) Did you know prior to going that you were going to seize some materials?

A From the two magazines that Sgt. Adcock bought, if those two were sitting in there, yes, sir, we were going to get those two.

Q So, you had time ...

A Right.

Q ... to get a search warrant?

A Right. We spent what, an hour? I don't know; I don't know how long we were over here.

Q You had Sgt. Adcock's testimony to support a search warrant?

A Yes, uh-huh.

Q Were you told directly by the two individuals that you stated advised you that you didn't need a search warrant?

A As far as the discussion we might possibly have, I can't honestly remember. I wish I had had a body mike on so you would have either heard the conversation ...

Q I understand. I understand your consternation, Officer. I realize it has been some time. Your statement is you can't remember whether or not you were told you didn't need it?

MR. HUDSON: Objection to leading, Your Honor.

THE COURT: Sustained.

Q (By Mr. Lee) Officer Moore, prior to going through the second door, did you believe Terry Forgy to be inside the store?

A Yes.

Q Once you got through the second door, did you look for him?

A Did we look for him? After Mr. Baird identified himself.

RECROSS EXAMINATION

BY MR. HUDSON:

Q Sgt. Moore, how far is the State Line Book Store, or the adult book store that we are talking about here from the state line between Texas and Arkansas?

A From the center line of the street, fifty foot, sixty foot; I don't know.

Q If the materials in that book store that you seized had been moved that fifty or a hundred feet, whatever it is, would you have been able to make an arrest?

A You mean if it crossed the center line of the street?

Q Yes.

A No.

Q When you and the other officers went past the second door and into the display room, were you still looking for Mr. Forgy at that point?

A When we what, now?

Q When you went past the second door into the room where the racks were, were you still looking for Mr. Forgy at that point?

A Yes.

Q By the time you had made the determination that Mr. Forgy was not there, had you already seen some of these magazines that have been marked Exhibit 1?

A Yes, sir.

MR. HUDSON: Pass the witness.

REDIRECT EXAMINATION

BY MR. LEE:

Q Officer Moore, when was it Officer Adcock came back to the police office with a magazine?

[Objection overruled]

A Would you repeat it, please?

[Mr. Lee]

Q Yes, sir. What time was it that Officer Adcock came back to the police department with the two magazines that he had purchased?

A Let's see, I was working two to ten, so it was sometime, I guess, after 1:30; I'm not sure.

Q Who was the other attorney you talked to other than the deputy prosecutor?

A Who was the other attorney?

Q Yes, sir.

A Kirk Johnson, the prosecuting attorney.

Q The prosecutor and the deputy prosecutor?

A Yes.

Q At what time did you discuss these matters with him?

A Sometime after that; sometime, you know, after Sgt. Adcock had came back.

Q Could you give me an estimate as to the time span?

A I don't know. I can't remember when Sgt. Adcock came back, and prior to going down to the book store.

Q Do you remember about how long your conversations with Mr. Johnson and Mr. McDaniel were?

A No, sir, I don't; I don't remember.

Q Was it thirty minutes or less?

A I guess it was longer than thirty minutes; seems like it was.

Q How long after your discussions with them was it before you got back to State Line Books?

A That I don't know either; I can't remember.

Q Did it ever cross your mind during these particular transactions that those books may have been moved across the state line?

A No, sir.

Q Was that ever a concern of yours?

A No, I didn't really think about it, no.

MR. LEE: No further questions of this witness.

RECROSS EXAMINATION

BY MR. HUDSON

Q Do you know whether that was a consideration of Major Cowart or not?

A I have no way of knowing.

MR. HUDSON: I have nothing further.

MR. LEE: I have nothing further.

THE COURT: Thank you. You may step down.

